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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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W. L. WILSON, EMIL E. LENGUETIN, FRED F.  
CONNOR, JOHN A. BLOOM, LAWRENCE  
HOBRECHT and BENJ. F. CURRIER,  
Petitioners,

vs.

THE CONTINENTAL BUILDING AND LOAN  
ASSOCIATION, a Corporation, et al.,  
Respondents.

In the Matter of CONTINENTAL BUILDING AND  
LOAN ASSOCIATION, Bankrupt.

---

**Petition for Revision**


Under Section 24b of the Bankruptcy Act of Congress, Approved  
July 1, 1898, to Revise, in Matter of Law, of a  
Certain Order of the United States District  
Court for the Northern District  
of California, First  
Division.

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**Filed**

JAN 31 1916

**F. D. Monckton**  
Clerk



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**United States**  
**Circuit Court of Appeals**  
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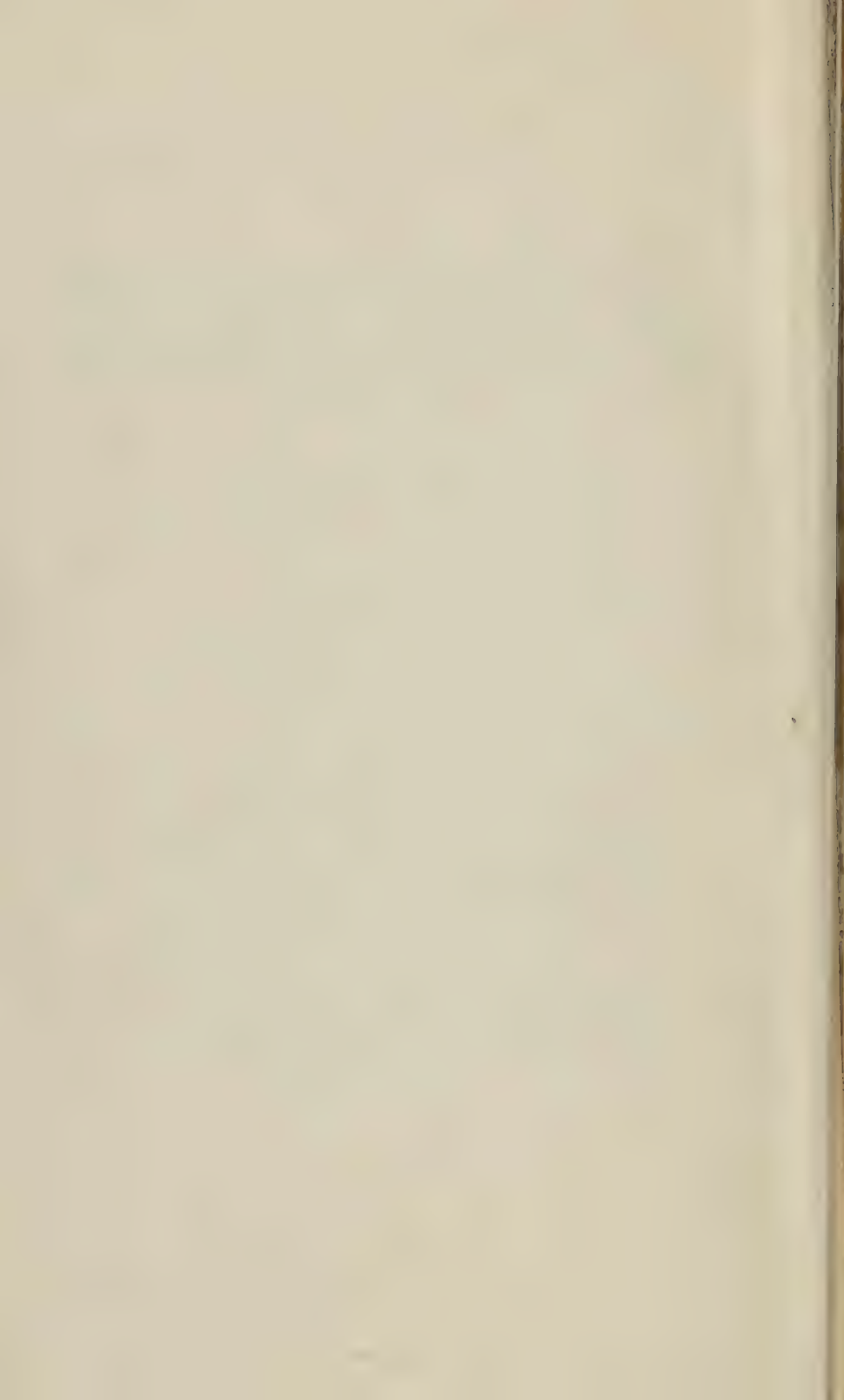


# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals for the  
Ninth Circuit.*

No. 9509.

In the Matter of the CONTINENTAL BUILDING  
AND LOAN ASSOCIATION,  
In Bankruptcy.

**Petition to Review.**

To the Honorable, the Judges of the United States  
Circuit Court of Appeals, for the Ninth Circuit:

The petition of W. L. Wilson, Emil E. Lenguetin,  
Fred F. Connor, John A. Bloom, Lawrence Hobrecht  
and Benj. F. Currier, creditors of said bankrupt, re-  
spectfully shows:

I.

That the above-named bankrupt was at all of the  
times hereinafter referred to and still is a building  
and loan corporation organized under and by virtue  
of the laws of the State of California governing build-  
ing and loan associations.

II.

That on the 9th day of August, 1915, the said  
Continental Building and Loan Association was duly  
adjudged a bankrupt by an order of the District  
Court of the United States for the Northern District  
of California, Ninth District thereof, duly given and  
made on that date; and that a further order of said  
Court duly given and made upon that date, all further  
proceedings in said matter were referred to Armand  
B. Kreft, referee in bankruptcy, sitting in the city  
and county of San Francisco.

## III.

That prior to the 15th day of September, 1915, your petitioners duly filed their several claims against said bankrupt estate, with the usual proof thereof, in due form as required by law.

## IV.

That on said 15th day of September, 1915, at the continued first meeting of creditors theretofore called by said referee in bankruptcy for the purpose of electing a trustee for the estate of said bankrupt, an election took place, at which said election the Anglo-California Trust Company, a corporation organized and existing under and by virtue of the laws of the State of California, and authorized to act as trustee, was elected by a great majority of all of the creditors present or represented at said meeting, both in number of creditors and in the amount of their claim.

## V.

That the only other candidates at said election were the Union Trust Company, a like corporation, and W. R. Williams, state superintendent of banks; and that the only creditors voting at said election were stockholders of said bankrupt estate; and that all of the votes cast for said Union Trust Company and said W. R. Williams were the votes of stockholders of said corporation.

## VI.

That at said meeting and after said election, said referee, by an oral order, disapproved the election of said Anglo-California Trust Company as such trustee.

VII.

That thereafter, and on September 27th, 1915, and within the time permitted by law, your petitioners did file in the United States District Court for the Northern District of California their petition wherein they did pray that the ruling of the referee be reversed and set aside and the election of said Anglo-California Trust Company as such trustee be approved and confirmed and did specify and complain of the following errors in the said order of said referee:

First. That the Anglo-California Trust Company was elected by a great majority of the creditors present or represented at said meeting, both in numbers of creditors and in the amount of their claims, but was without adequate cause disapproved.

Second. That the Anglo-California Trust Company is not disqualified to act as a trustee by reason of its having acted as the depositary of the securities of the bankrupt, if true; and that no proof was offered or made of such alleged fact, and the fact was not so found.

Third. That said Trust Company is not disqualified to act as trustee by reason of its having acted as trustee under deeds of trust for the bankrupt, if true; and that no proof was offered of such alleged fact, and the fact was not so found.

Fourth. That said Trust Company is not disqualified by reason of the necessity of the trustee herein to examine into the relations existing between the said company and the bankrupt, if true; and that no proof was offered of such alleged necessity, and the

fact was not so found.

Fifth. That the said Trust Company is not disqualified by reason of the counsel of the bankrupt being an attorney of the said company, even though true; and that no proof was offered or made of such fact, and that the fact was not so found and that such is not the fact.

Sixth. That it is not true that the election of the said Trust Company was produced or brought about by activity on the part of the officers, directors and attorneys of the bankrupt.

Seventh. That there was no evidence before the referee to show any activity on the part of the officers, directors and attorneys of the bankrupt, or any of them, to produce or bring about the election of said Trust Company.

Eighth. That there was no evidence before the referee to show that any activity on the part of the officers, directors and attorneys of the bankrupt, or any of them, did in fact influence any of the creditors to vote for said Trust Company as such trustee.

Ninth. That there was no evidence before the referee to show that such alleged activity did influence the votes of a sufficient number of creditors, if any, to change the result of the election.

Tenth. That the evidence wholly fails to show that the persons whose alleged activity was deemed obnoxious by the referee were not all stockholders with the same qualified status of creditors as those who opposed its election.

Eleventh. That the decision of the referee in effect

disfranchises the said officers, directors and attorneys.

Twelfth. That the said decision complained of in effect disfranchises the majority of the creditors for the benefit of the minority.

Thirteenth. That the decision complained of constitutes an abuse of discretion on the part of the referee.

### VIII.

That thereafter the said referee did file in said District Court his certificate on petition to review.

### IX.

That thereafter said petition came on for hearing in said District Court and was argued and submitted to said District Court; and that said District Court did thereafter, to wit, on the 9th day of November, 1915, make an order whereby it did affirm the said order of said referee; and that at the time of making said order, an opinion was filed by the Judge of said District Court setting out the reason for making said order, to which said opinion reference is hereby specially made.

### X.

That your petitioners hereby except to said order and decision of said District Court upon each and all of the grounds hereinafter specified as error; and allege that the said District Court committed error by reason of said decision to the prejudice of your petitioners, in each and all of the following respects, to wit:

First. That the Anglo-California Trust Company was elected by a great majority of the creditors

present or represented at said meeting, both in number of creditors and in the amount of their claims, but was without adequate cause disapproved.

Second. That the Anglo-California Trust Company is not disqualified to act as a trustee by reason of its having acted as the depository of the securities of the bankrupt.

Third. That said Trust Company is not disqualified to act as trustee by reason of its having acted as trustee under deeds of trust for the bankrupt.

Fourth. That said Trust Company is not disqualified by reason of the necessity of the trustee herein to examine into the relations existing between the said company and the bankrupt, if true; and that no proof was offered of such alleged necessity, and the fact was not so found.

Fifth. That the said Trust Company is not disqualified by reason of the counsel of the bankrupt being at times an attorney of the said company.

Sixth. That it is not true that the election of the said Trust Company was produced or brought about by activity on the part of the officers, directors and attorneys of the bankrupt, and there is no evidence thereof.

Seventh. That there was no evidence before the referee to show that any activity on the part of the officers, directors and attorneys of the bankrupt, or any of them, did in fact influence any of the creditors to vote for said Trust Company as such trustee.

Eighth. That there was no evidence before the referee to show that such alleged activity did in-

fluence the votes of a sufficient number of creditors, if any, to change the result of the election.

Ninth. That the persons whose alleged activity was deemed obnoxious by the referee were stockholders, with the same qualified status of creditors as all of those who opposed its election.

Tenth. That the decision in effect disfranchises the said officers, directors and attorneys.

Eleventh. That the said decision complained of in effect disfranchises the majority of the creditors for the benefit of the minority.

Twelfth. That the decision complained of constitutes an abuse of discretion.

WHEREFORE, your petitioners, being aggrieved by said order, ask that the same be revised in accordance with section 24b of the Bankruptcy Act of the United States; and that the order of said District Court and of said referee be reversed and set aside and the election of said Anglo-California Trust Company as trustee of said bankrupt be approved and confirmed; and that the record herein be certified up; and such further and other orders be made as may be proper to determine the form of the record and bring it before this Honorable Court.

B. M. AIKINS,

Attorney for Petitioners.

BENJ. F. CURRIER.

State of California,

City and County of San Francisco,—ss.

Benj. F. Currier, being first duly sworn, deposes and says: That he is one of the petitioners in the

above-entitled matter; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated upon information and belief; and that as to those matters he believes it to be true.

BENJ. F. CURRIER.

Subscribed and sworn to before me this 19th day of November, 1915.

[Seal]

ELLA L. SMITH,  
Notary Public in and for the City and County of San Francisco, State of California.

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[Endorsed]: No. 2685. United States Circuit Court of Appeals for the Ninth Circuit. W. L. Wilson, Emil E. Lenguetin, Fred F. Connor, John A. Bloom, Lawrence Hobrecht and Benj. F. Currier, Petitioners, vs. The Continental Building and Loan Association, a Corporation et al., Respondents. In the Matter of Continental Building and Loan Association, Bankrupt. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, of a Certain Order of the United States District Court for the Northern District of California, First Division.

Filed November 19, 1915.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

*In the United States Circuit Court of Appeals for the  
Ninth Circuit.*

No. 9509.

In the Matter of CONTINENTAL BUILDING  
AND LOAN ASSOCIATION,

In Bankruptcy.

**Notice of Filing of Petition for Review.**

To CONTINENTAL BUILDING & LOAN ASSOCIATION, and NAT SCHMULOWITZ, Its Attorney:

To MERCHANTS' NATIONAL BANK OF SAN FRANCISCO, and R. P. HENSHALL, Its Attorney:

To GEORGE W. MORDECAI, in *pro. per.* and Appearing for JAMES McCULLOUGH:

To R. G. HUNT, Attorney for Certain Creditors:

To W. P. CAVITT, Attorney for Certain Creditors:

To W. D. MANSFIELD, Attorney for Certain Creditors:

To J. S. HUTCHINSON, Attorney for Certain Creditors:

To J. G. DE FORREST, Attorney for Certain Creditors:

To SIDNEY E. EHRMAN, Attorney for Certain Creditors:

To JOHN YULE, Attorney for Certain Creditors:

YOU AND EACH OF YOU ARE HEREBY NOTIFIED that the undersigned has on behalf of the petitioners therein named, this day filed in the

office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, Northern District of California, a petition for review in the above-entitled matter, a copy of which said petition is hereto attached and made a part hereof.

Dated November 19, 1915.

B. M. AIKINS,

Attorney for Petitioners.

[Endorsed]: No. 2685. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Continental Building and Loan Association, In Bankruptcy. Notice of Filing of Petition for Review. Filed Nov. 29, 1915. F. D. Monckton, Clerk.

Service of a copy of the within notice and petition therein referred to accepted this 19th day of November, 1915.

NAT SCHMULOWITZ,

Atty. for Cont. B. & L. Assn.

GEO. W. MORDECAI,

Atty. for James McCullough.

R. P. HENSHALL,

Atty. for Merchants' Natl. Bk.

JOHN YULE.

Attorney for Certain Creditors.

J. G. DE FOREST,

Attorney for Certain Creditors.

HELLER, POWERS & EHRMAN,

Attorneys for Certain Creditors.

R. G. HUNT,

Attorney for Certain Creditors.

J. S. HUTCHINSON,

Attorney for Certain Creditors.

W. C. CAVITT,

Attorney for Certain Creditors.

WALTER D. MANSFIELD,

Attorney for Certain Creditors.

---

*In the United States Circuit Court of Appeals for the  
Ninth Circuit.*

In the Matter of CONTINENTAL BUILDING  
AND LOAN ASSOCIATION,

In Bankruptcy.

**Notice of Filing of Petition for Review.**

To CONTINENTAL BUILDING & LOAN AS-  
SOCIATION and NAT SCHMULOWITZ, Its  
Attorney:

To MERCHANTS' NATIONAL BANK OF SAN  
FRANCISCO and R. P. HENSHALL, Its  
Attorney:

To GEORGE W. MORDECAI, in *pro. per.* and Ap-  
pearing for JAMES McCULLOUGH:

To R. G. HUNT, Attorney for Certain Creditors:

To HUGO D. NEWHOUSE, Attorney for Certain  
Creditors.

To W. P. CAVITT, Attorney for Certain Creditors:

To W. D. MANSFIELD, Attorney for Certain  
Creditors:

To J. S. HUTCHINSON, Attorney for Certain  
Creditors:

To J. G. DE FORREST, Attorney for Certain Creditors:

To SIDNEY E. EHRMAN, Attorney for Certain Creditors:

To JOHN YULE, Attorney for Certain Creditors:

YOU AND EACH OF YOU ARE HEREBY NOTIFIED that the undersigned has on behalf of the petitioners therein named, this day filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, Northern District of California, a petition for review in the above-entitled matter, a copy of which said petition is herewith attached and made a part hereof.

Dated November 19, 1915.

B. M. AIKINS,

Attorney for Petitioners.

[Endorsed]: No. 2685. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Continental Building and Loan Association. In Bankruptcy. Notice of Filing of Petition for Review. Filed Dec. 1, 1915. F. D. Monckton, Clerk.

November 19, 1915.

Receipt of a copy of the within Notice of Filing of Petition for Review, together with a copy of the Petition for Review, is hereby acknowledged this 19th day of November, 1915.

H. D. NEWHOUSE,

M. S.,

Attorney for Certain Creditors.

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

W. L. WILSON, EMIL E. LENGUETIN, FRED F.  
CONNOR, JOHN A. BLOOM, LAWRENCE  
HOBRECHT and BENJ. F. CURRIER,  
Petitioners,

vs.

THE CONTINENTAL BUILDING AND LOAN  
ASSOCIATION, a Corporation, et al.,  
Respondents.

In the Matter of CONTINENTAL BUILDING AND  
LOAN ASSOCIATION, Bankrupt.

---

**TRANSCRIPT OF RECORD IN SUPPORT OF  
PETITION FOR REVISION**

Under Section 24b of the Bankruptcy Act of Congress, Approved  
July 1, 1898, to Revise, in Matter of Law, of a  
Certain Order of the United States District  
Court for the Northern District  
of California, First  
Division.

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*In the United States District Court for the Northern  
District of California, First Division.*

No. 9509.

In the Matter of CONTINENTAL BUILDING  
AND LOAN ASSOCIATION,

In Bankruptcy.

**Praecipe for Transcript on Petition for Review to  
the Circuit Court of Appeals of the United  
States.**

To the Clerk of the United States District Court for  
the Ninth Judicial District, Northern Division:

You are requested to make a transcript of the  
record to be filed in the United States Circuit Court  
of Appeals upon the petition for review filed in that  
court by W. L. Wilson et al. in the above-entitled pro-  
ceeding, and to include in said transcript the follow-  
ing:

1. Petition for Review by United States District  
Court of the decision of the referee in bankruptcy.
2. Certificate of Referee.
3. Order of District Court Affirming the Decision  
of the Referee.
4. Clerk's Certificate.

Dated San Francisco, Cal., December 6, 1915.

B. M. AIKINS,

Attorney for said W. L. Wilson et al. [1\*]

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\*Page-number appearing at foot of page of original Petition for Re-  
vision.

Received copy of within this 16th day of December,  
1915.

NAT SCHMULOWITZ,

Atty. for the Bankrupt.

R. P. HENSHALL,

Atty. for Merchants' National Bank.

GEORGE W. MORDECAI,

Atty. for JAMES McCULLOUGH.

REUBEN G. HUNT,

HUGO D. NEWHOUSE,

HELLER, POWERS & EHRMAN,

Attys. for Certain Creditors.

J. G. DE FOREST,

Atty. for Certain Creditors.

WALTER D. MANSFIELD,

Atty. for Certain Creditors.

J. S. HUTCHINSON,

Atty. for Certain Creditors.

W. C. CAVITT,

Atty. for Certain Creditors.

JOHN YULE,

Atty. for Certain Creditors.

[Endorsed]: Filed Dec. 21, 1915, at 10 o'clock and  
20 min. A. M. W. B. Maling, Clerk. By C. W. Cal-  
breath, Deputy Clerk. [2]

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*In the United States District Court for the Northern  
District of California, First Division.*

No. 9509.

In the Matter of CONTINENTAL BUILDING  
AND LOAN ASSOCIATION,

In Bankruptcy.

**Petition for Review of Order of Referee Disapproving Election of Anglo-California Trust Company as Trustee.**

To the Honorable, the Judge of the District Court of the United States, for the Northern District of California, First Division thereof:

The petition of W. L. Wilson, Emil E. Lenguetin, Fred F. Connor, John A. Bloom, Lawrence Hobrecht and Benj. F. Currier, creditors of said bankrupt, respectfully sheweth that on the 15th day of September, 1915, manifest error to the prejudice of your petitioners, was made by the referee in said matter in an order disapproving the election of the Anglo-California Trust Company as trustee herein, and ordering a new election.

The errors complained of are:

First. That the Anglo-California Trust Company was elected by a great majority of the creditors present or represented at said meeting, both in number of creditors and in the amount of their claim, but was without adequate cause disapproved.

Second. That the Anglo-California Trust Company is not disqualified to act as a trustee by reason of its having acted as the depository of the securities of the bankrupt, if true; and that no proof was offered or made of such alleged fact, and the fact was not so found. [3]

Third. That said Trust Company is not disqualified to act as trustee by reason of its having acted as trustee under deeds of trust for the bankrupt, if true; and that no proof was offered of such alleged

fact, and the fact was not so found.

Fourth. That said Trust Company is not disqualified by reason of the necessity of the trustee herein to examine into the relation existing between the said company and the bankrupt, if true; and that no proof was offered of such alleged necessity, and the fact was not so found.

Fifth. That the said Trust Company is not disqualified by reason of the counsel of the bankrupt being an attorney of the said company, even though true; and that no proof was offered or made of such fact, and that the fact was not so found and that such is not the fact.

Sixth. That it is not true that the election of the said Trust Company was produced or brought about by activity on the part of the officers, directors and attorneys of the bankrupt.

Seventh. That there was no evidence before the referee to show any activity on the part of the officers, directors and attorneys of the bankrupt, or any of them, to produce or bring about the election of said Trust Company.

Eighth. That there was no evidence before the referee to show that any activity on the part of the officers, directors and attorneys, of the bankrupt, or any of them did in fact influence any of the creditors to vote for said Trust Company as such trustee.

[4]

Ninth. That there was no evidence before the referee to show that such alleged activity did influence the votes of a sufficient number of creditors, if any, to change the result of the election.

Tenth. That the evidence wholly fails to show that the persons whose alleged activity was deemed obnoxious by the referee were not all stockholders, with the same qualified status of creditors as those who opposed its election:

Eleventh. That the decision of the referee in effect disfranchises the said officers, directors and attorneys.

Twelfth. That the said decision complained of in effect disfranchises the majority of the creditors for the benefit of the minority.

Thirteenth. That the decision complained of constitutes an abuse of discretion on the part of the referee.

WHEREFORE, your said petitioners pray that the record herein may be certified up; and that the ruling of the referee be reversed and set aside and the election of Anglo-California Trust Company as trustee herein be approved and confirmed.

B. M. AIKINS,

Attorney for Petitioners.

[Endorsed]: Filed Sept. 27, 1915, 2:45 P. M., A. B. Kreft, Referee. [5]

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*In the District Court of the United States, Northern  
District of California, First Division.*

Before ARMAND B. KREFT, Referee in Bankruptcy.

No. 9509.

In the Matter of CONTINENTAL BUILDING &  
LOAN ASSOCIATION,

In Bankruptcy.

**Referee's Certificate on Petition to Review.**

To the Honorable MAURICE T. DOOLING, Judge  
of the District Court of the United States, in  
and for the Northern District of California:

The undersigned, referee in bankruptcy, to whom  
was referred the above-entitled matter, respectfully  
certifies and reports:

That on the 15th day of September, 1915, an order was made herein disapproving the election of the Anglo-California Trust Company as trustee of the estate of said bankrupt. On September 27th, 1915, within the time extended by the referee, W. L. Wilson, a creditor herein, and six other creditors, feeling aggrieved by said order, filed a petition to review the same.

I will endeavor to state briefly the proceedings had in this matter leading up to the making of the order reviewed.

The first meeting of creditors herein was called for the 30th day of August last, for the purpose, among other things, of choosing one or three trustees herein. On the election of [6] trustee the claims were largely represented by attorneys-in-fact to whom the creditors had given power to vote the same at such election.

Nearly one hundred claims, aggregating about \$60,000, voted for the Union Trust Company; 184 claims aggregating about \$123,000, were voted for W. L. Williams, state superintendent of banks; over 500 claims aggregating nearly \$400,000 were voted for B. G. Tognazzi. Owing to the large number of

claims presented, the exact number and amount of the claims voted were not computed, it being conceded that Mr. Tognazzi had received the vote of both a majority in number and amount of claims of creditors present or represented. Of the claims voting for Mr. Tognazzi, about 500, aggregating about \$375,000, were voted by Mr. James McCullough, president of the Continental Building & Loan Association, upon powers of attorney executed to him. Mr. Hugo Newhouse, representing claims voted for the Union Trust Company, and Mr. R. G. Hunt, representing claims voted for Mr. W. R. Williams, opposed the approval of Mr. Tognazzi as trustee on the ground that his election was brought about through the influence of officers and attorneys for bankrupt, Mr. McCullough being the president of the bankrupt could not be permitted to exercise proxies for the choice of trustees. It appearing to me that the choice of Mr. Tognazzi had been influenced by the acts of the officers and attorneys connected with the bankrupt corporation, I disapproved the election, and continued the meeting of the creditors to the 15th day of September for choice of another trustee, stating in open court to the effect that directors, officers and attorneys of the bankrupt would not be permitted to participate in the election or influence claimants as to whom they should vote for in the choice of trustee, and that [7] Mr. Tognazzi could not again be a candidate. Mr. Gavin McNab has been the leading counsel for the Continental Building & Loan Association for some years; Mr. Nat Schmulowitz, who appears of record herein as

attorney for the bankrupt, and who appeared for the bankrupt at the session aforesaid, is an associate of Mr. Gavin McNab. Mr. George W. Mordecai who was present at the session aforesaid is also an associate of Mr. McNab. Shortly after that session Mr. Mordecai called upon me and stated in substance that they did not desire to do anything contrary to my wishes in the matter of this selection, and spoke of the shortness of time for the creditors who had given letters of attorney to Mr. McCullough to obtain other representation; that many of them resided out of this city. I stated that if the time was found to be too short, further time would be given; that I appreciated the difficulty of the creditors in obtaining proper representation because of their number and various places of residence, and suggested that a meeting of the creditors represented by Mr. McCullough, who resided in or near this city, might be called; that I saw no objection to Mr. McCullough calling said meeting, and advising them that he could not represent them, but that he should not participate in their meeting; that at such a meeting the creditors might determine on some line of action and take the matter up with distant creditors represented by Mr. McCullough, or for that matter, with any other creditors whom they might desire to have join with them; that the election showed that a substantial majority had chosen Mr. McCullough to represent them, and that I desired that they should have ample opportunity to be present or represented, but that I must insist that the creditors choose a trustee without suggestion of the attorneys, officers or directors of the bankrupt. [8]

At the meeting on September 15th Mr. Joseph A. Leonard voted 391 claims, aggregating \$305,437.50 for the Anglo-California Trust Company as trustee, being mainly claims for which he had been substituted as attorney in fact in the place of Mr. McCullough. Fourteen other claims aggregating about \$15,000, were also voted for the Anglo-California Trust Company; 107 claims, aggregating about \$62,000 were voted for the Union Trust Company and 202 claims, aggregating about \$140,000 were voted for Mr. Williams. The Anglo-California Trust Company received a majority in number and amount of claims of creditors present or represented at this meeting, Mr. Hunt, on behalf of the creditors voting for Mr. Williams and for the Union Trust Company objected to the election of the Anglo-California Trust Company on the grounds: First, that said company has been and now is the depositary of the Continental Building & Loan Association and has acted as trustee on its deed of trust; second, that its election was brought about by activity on the part of the officers, directors and attorneys of the bankrupt. (Transcript pages 38 and 39.)

Certain witnesses were examined and documentary evidence was offered in support of these objections. The substance of the testimony and evidence is as follows:

Exhibit "A," is a circular letter under date of August 5, 1915, sent to the stockholders of the bankrupt by its directors, setting forth the reasons of the board of directors in placing the association in the Federal Court for liquidation, and recom-

mending Frank H. Gould as a suitable person for trustee. The letter refers to enclosed claim and to proxy to James McCullough, president of the bankrupt, and recommends the execution of said papers. Exhibit "B" is a letter dated August 14, 1915, addressed to the stockholders by the directors, and concerns alleged acts of brokers and speculators [9] who it was charged were seeking to influence the stockholders. Exhibit "C" is a letter to stockholders, dated August 16, 1915, signed by certain stockholders, and contains a statement concerning the action of one William H. Cox and the candidacy of Mr. Williams for trustee. Exhibit "D" is a letter to Mr. McCullough from a stockholder acknowledging the receipt of claim and proxy. Exhibit "E" is form of claim and proxy sent out with letter exhibit "A." Mr. Corbin, secretary and general manager of the bankrupt, testified that the letter, exhibit "A," was prepared on the evening of August 7th, the day on which the petition herein was filed, and that Mr. McNab was the moving spirit in the preparation of such letter. (Pages 14 and 15.)

Referring to the compilation of the letter, exhibit "C," of certain stockholders to the other stockholders, Mr. Corbin testified: "I rather think Mr. McNab had something to do with it."

He also stated that he, Corbin, talked to most of the stockholders who signed the letter, about signing. (Page 15.)

Exhibits "A" to "E" were admitted in evidence to show acts of the officers of the bankrupt after the commencement of this proceeding, concerning the

election of trustee herein, up to August 30th, the date of the first meeting of creditors.

Concerning the acts of officers and attorneys of the bankrupt after said meeting of creditors of August 30th, and before the meeting of creditors herein of September 15th, the following testimony was received:

Mr. McCullough testified that within 24 hours after the meeting of August 30, a directors' meeting of the bankrupt was held, at which Mr. Mordecai, Mr. Jarman and Mr. Corbin were present; that he thought Mr. McNab was also present. In regard to what [10] was said at said meeting he testified: (Page 7.)

“Q. Can't you remember anything that was said at that time?

A. Well, the only thing was that I was not acceptable; that I could not qualify to cast the votes, and that they would have to have somebody else.

Q. Were any names suggested as to who would be the proper person?

A. Mr. Leonard was suggested.

Q. Was there any discussion as to what procedure should be taken by you and the rest of the directors?

A. Nothing except that they were to send out for other proxies and get instructions.

Q. You mean proxies for Mr. Leonard?

A. Yes.”

Concerning the meeting of creditors referred to by Mr. McCullough, Mr. Mordecai testified: (Page 31.)

“The WITNESS.—With regard to this meeting that Mr. McCullough spoke about which took place after the last hearing in court, there was no such meeting, either formally or informally. Following that meeting I reported at that office what had taken place down here, the ruling of the referee in regard to Mr. McCullough. And I think that Mr. McCullough and Mr. McNab and myself were present. I think those were the only ones. And the only thing that took place at that time was a discussion as to whether or not anything could be done with the proxies that Mr. McCullough held; whether they could have someone to represent them, since he was disqualified; and it was decided to call a meeting of the stockholders of the association; and pursuant to that, this meeting in the Pacific Building was called. Mr. Leonard’s name was not mentioned at that time, at that meeting, nor was the name of any other person for trustee presented at that meeting.”

The meeting referred to by Mr. McCullough was evidently an informal conference. After this conference a letter, exhibit “F,” signed by Mr. McCullough, not dated, was sent out. This was within 24 hours after the meeting of creditors of August 30th, Mr. McCullough testified that he believed it was sent out to all the stockholders. (Page 7.) This letter contains the following statement: “I will immediately assemble the San Francisco stockholders and obtain an expression of their wishes and request them to organize themselves and send a communica-

tion to their fellow stockholders and creditors throughout the state." No time or place of said meeting is stated therein. Concerning this stockholders' meeting Mr. McCullough testified: (Page 8).

[11]

"Q. That letter in fact stated that there was going to be a meeting of creditors called?

A. Yes.

Q. How did you call that meeting, Mr. McCullough? A. By letter notifying them.

Q. Was it a postal card or a letter?

A. A letter.

Q. And how was that sent?

A. Sent to the different stockholders.

Q. All the stockholders, or certain ones?

A. All the stockholders in the City and in Oakland.

Q. Just those around the bay?

A. Yes. I am not sure whether I—

Q. This called for a meeting to be held where?

A. I don't think it was specified at the time.

Q. Didn't it tell them where to go? A. Yes.

Q. Was it the Pacific Building?

A. The Pacific Building, yes."

Under date of September 1st, a circular letter was addressed to the stockholders, signed "Wallace Bradford, chairman of meeting." (Exhibit "G.") This letter states in the opening paragraph that a meeting was held in the Pacific Building, room 916, on the 31st day of August, 1915, by the stockholders in San Francisco who had given their proxies to Mr. McCullough after written notice to every such stock-

holder in San Francisco of said meeting.

The written notice given by Mr. McCullough calling the stockholders' meeting at the Pacific Building was not produced. According to the letter, exhibit "G," this meeting was held the day after the creditors' meeting in my office at which Mr. Tognazzi's election was disapproved. This time, in my opinion, was insufficient to obtain a representative stockholders' meeting. I do not understand why in the circular letter, exhibit "F," the time and place of meeting was not stated and why it was necessary to send another communication fixing the time and place.

Under date of September 2, 1915, Mr. McCullough addressed another letter to the stockholders. (Exhibit "H.") In which he states, in part, that he was unable to vote the proxies for Mr. Frank H. Gould, as trustee, on account of his possibly being disqualified by holding a Federal position, and sickness; he therefore voted them for Mr. B. G. Tognazzi, who, for many years, was manager of the [12] Central Trust Company, now the Anglo-California Trust Company, which trust company holds the securities of the Continental Building & Loan Association, and who is now the manager of the California Central Creameries. He further states:

"In order to meet any possible objection, and at the suggestion of the Referee in Bankruptcy, I called a meeting of all the stockholders in San Francisco, who had given me their proxies, by giving written notice to every such stockholder.

These stockholders assembled in large num-

bers on August 31st, 1915, at Room 916, Pacific Building, San Francisco, and elected Mr. Wallace Bradford and Mr. Robert Coulter, president and secretary, respectively, of the meeting, these gentlemen being stockholders of long standing, and unanimously decided to send a communication to all the stockholders who had given their proxies to me, setting forth the facts, and asking that a substitution of proxy be sent to Mr. Joseph A. Leonard, 970 Phelan Building, San Francisco, so that the interests of the stockholders themselves, might be represented and protected at the meeting before the Referee in Bankruptcy on September 15, 1915."

He stated that he thought that Mr. McNab prepared the letter, exhibit "H." (Page 10.)

Concerning the meeting at the Pacific Building, Mr. McCullough testified, pages 8 and 9, that Mr. Leonard was there at the request of Mr. Yule, a stockholder; that he, Mr. McCullough, did not take an active part in this meeting; that he introduced Mr. Yule; that Mr. Bradford was the chairman, but he did not know who suggested Mr. Bradford as chairman, that there were about 50 persons present at said meeting. (Page 9.)

William Corbin testified that he had been secretary and general manager of the bankrupt for a good many years. He stated that he tried to follow the instructions of the Court in respect to the order of the Court in this matter. (Referring to my remarks at the first meeting of creditors on August 30th respecting the participation of officers of the bank-

rupt in the matter of the election of trustee.) Being asked as to whether he has since made attempts to induce stockholders to give their proxies to Mr. Leonard, he testified that when people asked his advice as to whom they should give their proxies to, he told them "Mr. Leonard." (Testimony, page 17.) [13]

In reply to the question: "When was it decided that Mr. Leonard should cast his vote for the Anglo-California Trust Company?" he answered: "I don't know."

"Q. Do you know when notice was sent out of the decision? A. It was sent out last night.

Q. Who sent it out?

A. Who physically sent it out?

Q. Yes. A. I did.

Q. You did? A. Yes; my force did.

Q. At whose request?

A. At Mr. Leonard's request."

The notice is marked exhibit "J."

Mr. J. B. Osborn testified, on being shown exhibit "C," which is the circular letter signed by certain stockholders, which includes Mr. Osborn as a signer, that he knew nothing about the letter at all. Replying to the question: "Has anybody called you up within the last week in reference to how you should vote in the last meeting?" he answered, "Mr. Corbin."

"What did he tell you?

A. Well, he advised me that Mr. Leonard was a good man for the place.

Q. He advised you to vote for Mr. Leonard?

A. As being a good man for the place.”  
(Page 20.)

Joseph A. Leonard testified that he is manager of the Urban Realty Improvement Company; that Mr. Gavin McNab is an attorney of the company and a director thereof; that Judge Yule was the first party who spoke to him about acting as proxy holder in this matter; that he was at the meeting in the Pacific Building at the request of Judge Yule; that the proxies to him were received at his, Mr. Leonard's office. I quote the following from his testimony (page 24):

“Q. Who picked the Anglo-California Trust Company as the candidate for whom you should vote?

A. I don't know who that was, I called up Mr. Cordray, the trust officer, and asked him if it was satisfactory to him.

Q. Why did you happen to call him up?

A. Because I had understood from him that he had been requested to act as trustee.

Q. And he told you that he had been requested to act? A. Yes.

Q. Do you know who requested him?

A. I do not.

Q. Did he tell you who requested him?

A. He did not.

Q. Did you have anything to do with the sending out of this exhibit “J,” notifying the stockholders of the selection? A. He did not.

Q. Did you know that it was sent out?

A. I didn't know that it was sent out. I never had seen it.” [14]

Mr. N. Schmulowitz, counsel for the bankrupt herein, testified that the following attorneys are associated with Mr. Gavin McNab: Luther Elkins, A. H. Jarman, R. P. Henshall, O. B. Wyman, George W. Mordecai and the witness; that Mr. Jarman and Mr. Mordecai and the witness are also attorneys of the Continental Building & Loan Association. (Page 26.)

Wallace Bradford testified. (Page 34.) That he presided at the meeting at the Pacific Building; that Mr. McCullough was the only officer of the Continental present at said meeting, as far as he knew; that Mr. Coulter was secretary, and nominated the witness for chairman:

I quote the following from his testimony: (Page 35).

“Mr. HUNT.—Q. Mr. Bradford, do you remember attending a meeting of the stockholders held in the Pacific Building along about the 14th of August? A. Yes, sir.

Q. Did you take an active part in the discussions? A. Yes, sir.

Q. Didn't you state to the creditors and stockholders present at that meeting that you thought that Mr. McNab and Mr. Corbin ought to be allowed to remain in the control of affairs?

A. I probably did, because that is my opinion.

Q. It still is your opinion, is it?

A. Yes, sir—most decidedly.”

I also quote from his testimony: (Page 37.)

“Q. Who picked the Anglo-California Trust Company?

A. I don't know, except that that was principally the suggestion of the people who were present, and other parties concerned in that transaction.

Q. This card speaks for itself. The purport of it is that the undersigned stockholder's committee, signed by yourself as chairman, wishes to inform you that it is the intention of this committee to request Mr. Leonard to vote for the Anglo-California Trust Company. Who principally suggested the Anglo-California Trust Company?

A. It was the opinion at that meeting that meeting that Mr. Leonard should be elected to that position; that he was to act for those who were at that meeting in deciding upon a proper person to take his place.

Q. Well now, who decided on the Anglo-California Trust Company?

A. That states that Mr. Leonard decided.

Q. No, sir, it does not.

A. Doesn't it state that he decided it?

Q. It states that the stockholders' committee, of which you were acting as chairman, decided it. A. Yes.

Q. Who was it that directed the drafting of that card?

A. You will have to ask the secretary.

Q. You don't know anything about that?

A. No, only that the secretary was authorized to notify the people, when that decision was made." [15]

On offering testimony in support of his objection Mr. Hunt stated that he desired to show that Mr. McNab is a director of Anglo-California Trust Company, and that said company has acted as trustee for the Continental Building & Loan Association, but he needed a continuance to call witnesses for this purpose. I stated that if it became necessary to certify the matter to the Court I would permit him to complete this record in this respect. Being satisfied from the evidence already presented that Mr. Hunt's objection should be sustained, I concluded to decide the matter on the record as it then stood.

On September 29th, I was attended upon by Mr. B. M. Aikins, counsel for reviewing creditors, and by Mr. R. G. Hunt. The *following* facts were admitted by stipulation between them:

1. That Gavin McNab is a director of the Anglo-California Trust Co.
2. That, among others, Gavin McNab represents the Anglo-California Trust Co. from time to time as an attorney.
3. That the Anglo-California Trust Co. is the trustee named in, and holds, certain securities, to wit, a large number of deeds of trust, securing obligations owing to the bankrupt.

Mr. Aikins, however, objected to the admission of these facts in evidence, which objection was overruled. The trust relationship between the Anglo-California Trust Company and the bankrupt is shown by the statements in the bankrupt's schedules filed herein, from which it appears that the Anglo-California Trust Company is trustee under many

deeds of trust, for the Continental Building & Loan Association.

I would be pleased to have the creditors herein select as trustee a financial institution of equal standing with the Anglo-California Trust Company, but because of its relations with the bankrupt, and the association with it of attorney of the bankrupt, it is my opinion that it should not be the trustee herein.

The stockholders first represented by Mr. McCullough, then by Mr. Leonard have the power, in number and amount, to name [16] the trustee. They have not been deprived of the right of exercising that power, but I hold that they must choose a disinterested person, and that the choice shall be their choice and not that of the officers or attorneys connected with the former management of the bankrupt. Notice that their claims would be voted for the Anglo-California Trust Company as trustee was not sent to them until the night of September the 14th. The election was held on September 15th at 10 A. M., yet in the circular letter, exhibit "G," notifying them that Mr. Leonard had been designated at a stockholders' meeting as proxy holder, they were advised: "Before any trustee is decided upon by us, the name will be submitted to you by mail, with the reasons for the recommendation." This statement is emphasized by being printed in larger type than the remaining portion of the document.

When the powers of attorney such as are given in the present case do not designate the person to be voted for, the attorney-in-fact will name the per-

son, but if the proxy holder is to exercise such power he must be a disinterested person, and not the selection of the officers and attorneys of the bankrupt. The proxy holder, Mr. Leonard, testified that he did not know who selected the Anglo-California Trust Company as candidate for trustee. Mr. Bradford, who was chairman of the meeting at which Mr. Leonard was chosen, testified in effect that he is still of the opinion that Mr. Corbin and Mr. McNab should conduct and lead the liquidation of its concern. While Mr. Bradford is entitled to this view, he is in my opinion not a proper person to lead the creditors in this matter, in view of the instructions of the referee that the officers and attorneys of the bankrupt must hold hands off in this election. Mr. Leonard is the president and manager of a company of which Mr. Gavin McNab is a director and its attorney, and the trustee chosen is a company in which Mr. [17] McNab is also a director and one of its attorneys.

Under these circumstances, even if the attorneys and officers of the bankrupt had nothing whatever to do with this choice, I could not approve the selection.

The courts have uniformly refused to approve of trustees chosen through influence of officers of bankrupts or attorneys for bankrupt.

In re John F. McGill, 5 A. B. R., 161.

In re Rekersdres, 5 A. B. R., 811.

Falter vs. Reinhard, 4 A. B. R., 782; affirmed,  
5 A. B. R., 155.

In re Henschel, 6 A. B. R., 25.

In re Dayville Woolen Co., 8 A. B. R., 85.

In re Blue Ridge Packing Co., 11 A. B. R., 36.

In re Gordon Supply Manufacturing Co., 12  
A. B. R., 94.

In re Cooper, 14 A. B. R., 320.

In re Eastlack, 16 A. B. R., 529.

In re Hanson, 19 A. B. R., 237.

In re L. W. Day & Co., 23 A. B. R., 56.

In re Fletcher & Ployd, 25 A. B. R., 196.

In re Kreuger, 27 A. B. R., 443.

In re Sitting, 25 A. B. R., 685.

In re Van De Mark, 23 A. B. R., 760. [18]

In this case, at the first meeting, August 30th, the officers of the bankrupt openly sought the appointment of a trustee of their own selection. Of this I have no criticism to make, they acted openly, under the belief that they had such right because *because* of the exceptional relationship between the stockholders as creditors and as members of the bankrupt corporation, and in which latter capacity they are liable to outside creditors upon stockholders' liability for the debts of the corporation. The referee, however, having disapproved of this course, they should have appealed to the judge by review of referee's order before the next election was held, if they considered that they were acting within their right. In my opinion the evidence shows that the officers and attorneys of the bankrupt have dictated the steps leading up to the choice of the Anglo-California Trust Company, and evidences a determination on their part to control the administration of this estate in this court.

A second petition to review another order herein has been filed by the Merchants National Bank of San Francisco, which is sent up under a separate certificate. The Merchants National Bank is an outside creditor, having a claim for \$2,611.20. It takes the position that as the stockholders are liable for the debts of the corporation, its claim is entitled to priority, and must be paid in full. Its petition for review is based upon the proposition that the outside creditors alone are entitled to name the trustee; that stockholders of the bankrupt are disqualified. At the meeting of September 15th, counsel for the Merchants National Bank sought to vote this claim and to exclude all stockholders from participating in the election. In my opinion, the taking of this petition to review emanates from the office of counsel for the bankrupt. It is represented by an attorney associated with the attorney for the bankrupt. In addition to said Merchants National Bank there are only two creditors who are not stockholders, and their claims amount to \$9,587.70. [19]

Considering that the indebtedness to the stockholders as scheduled amounts to \$751,434.65 and that the assets which are scheduled at \$769,508.13 will, with the exception of the few outside creditors named, be distributed to the stockholders, I can have no patience with a creditor who is claiming the right to be paid in full and who attempts to take the administration of this estate upon a claim of \$2,611.20 out of the hands of the creditors representing \$751,434.75 upon a technicality of the kind presented. In my opinion, this is a further attempt

upon the part of the officers of the Continental Building & Loan Association to control the administration of this estate.

An involuntary proceeding in bankruptcy was brought against the Continental Building & Loan Association in 1912 in this court and an opposition was entered by it, and the case was referred to me to ascertain and report the facts and my conclusions thereon. My report was filed on January 16, 1913, in which I found that the association was solvent and had not committed the acts of bankruptcy charged, and the proceeding was dismissed. In my report I considered at length the nature of associations of this character and the rights of the stockholders as creditors in the event of bankruptcy proceedings. I quote the following from page 19 of said report:

“There is no independent stock of this association. Its capital stock consists of the dues paid in by its members. The Land and Building Act as amended (Civil Code, Section 634) reads: ‘The capital stock shall consist of the accumulated dues, together with the apportioned profits of the corporation.’ There is also a provision for the usual stockholders’ liability upon debts owing by the corporation to outside creditors.

In what respect do the stockholders of such an association differ from the stockholders of ordinary commercial corporations,

The case of *Towle vs. American Building, Loan and Investment Co.*, 61 Fed. 466, Grosseup,

District Judge, is a leading case referred to by the courts.

Concerning the nature of these corporations, I quote the following from this decision: [20]

‘These associations are essentially corporate copartnerships. They have no function except to gather together, from small, stated contributions, sums large enough to justify loans. Their officers are the agents of every stockholder, and whether a stockholder is creditor or debtor depends on whether he has exercised his privilege of borrowing money from the common fund. The insolvency of such an institution is *suie generis*. There can be, strictly speaking, no insolvency, for the only creditors are the stockholders by virtue of their stock. The so-called insolvency is such a condition of the affairs of the association as reduces the available and collectible funds below the level of the amount of stock already paid in. The association is said to be insolvent when it cannot pay back to its stockholders the amount of their actual contributions, dollar for dollar. The association does not deal as a corporate entity with its borrowers as stranger. The by-laws determine who become borrowers, and the officers, who are agents of such borrowers, as well as of the remaining stockholders, in the transaction, simply execute these by-laws. None of the liabilities or maxims, therefore, which apply to contracts between strangers are applicable to these transactions. The transaction of bor-

rowing is not between strangers, or the result of contract or dealing, but is simply the execution of pre-existing rights among the stockholders. I think it plain that, when the condition of the association shows that, instead of making profits, it loses the principal of the contributing stockholders, there is power in a court of equity to wind up its affairs upon purely equitable principles. . . .

The inability of the association to proceed to its expected termination by reason of the impairment of its collectible loans is attributable alike to each stockholder. The officers of the association are their agents, and the results of their investments are alike the fortune or misfortune of each stockholder, whether it be borrower or nonborrower. When a condition thus brought about justifies a court of equity in peremptorily terminating the career of the association, the adjustment should be made as near upon the line of what would take place if the association lived out its life as is possible.' "

I also quote from page 22 of said report as follows:

"But there is another principle of these associations to be considered, and out of which a condition of insolvency may arise, peculiar to such associations, and that is the right given by law to every member to withdraw from the association and receive such an amount of what he has paid in, and profits earned, less penalties for withdrawal, provided by law. The right of

withdrawal is absolute. While by virtue of his membership he is liable for the debts of the corporation to outside creditors in the proportion represented by his stock, as between the association and himself, the association cannot compel him to complete his stock subscription. There is, therefore, an absolute obligation on the part of the association to pay all members such withdrawal value, and this establishes a condition of debtor and creditor." [21]

I also quote from page 23 of said report as follows:

"To the extent of the obligation of the corporation to pay the withdrawal value of the stock based upon profits actually existing, the identity of the corporation is distinguished from that of its members. If the corporation is solvent they can in law or in equity recover such withdrawal value. If the corporation is unable to pay back the principal paid in a state of insolvency exists. In the opinion of the referee the stockholders have provable claims in bankruptcy to this extent, and are entitled to their proportionate share of the profits, if any."

In view of the fact that the stockholders themselves choose the officers to manage their affairs, and that there is no capital stock other than the dues and sums paid in by the stockholders, there is much force in the contention that this proceeding partakes more of a liquidation between the persons constituting the bankrupt corporation, than a liquidation between a bankrupt and its creditors, and that the usual rules governing relations between bankrupts

and creditors do not apply; that the reason why bankrupts are not permitted to influence appointments of trustees is that the bankrupt's property passes from him, and he has no further interest therein, but remains subject to an examination and accounting to his creditors. He should, therefore, not have a voice in the naming of the person who is to investigate his acts; but in this case the identity of the bankrupt and the creditors being one and the same, if the majority of the stockholders so desire, they should have the right to direct that the liquidation be conducted by their officers.

It is along this line of reasoning, I understand, that the officers and attorneys considered it proper for them to suggest a candidate for trustee, and to request the members to send authority to the president of the association to vote their claims.

I do not agree with this position, for the following reasons: [22]

To assist members in building and paying for their homes was originally the primary object of building and loan associations, and the members took an active part in the management of the business. But such associations have developed commercially. Laws have been passed regulating their conduct in this state; the office of Building & Loan Commissioner is established by law, to examine into the affairs of such concerns—this, I take it, for the protection of the public dealing with them. An association such as the Continental Building & Loan Association, having more than fifteen hundred members, with assets aggregating approximately a mil-

lion dollars, is a great financial institution. The schedules herein show that it owes to Class C. stockholders \$302,869. This stock does not represent monthly savings of its members, but is fully paid up stock, paid in at the time the stock is issued. The member buying this class of stock receives a certificate with interest coupons attached, payable semi-annually, and on which he receives 6 per cent on the money paid for his stock, but does not otherwise participate in the earnings of the association. This has all the features of a savings bank account paying 6 per cent interest. (Schedules, pages 4 to 22.)

Class D stock, scheduled at \$46,013.34 as owing thereon, represents stock issued for money deposited subject to check drawn on the association. This is substantially a commercial bank account. (Schedule, pages 59 to 61.)

Class DC stock (schedules 49 to 55) is issued to Borrowers and held by the association under assignment to it as security for repayment of loans. The DC stock referred to in pages 56 to 58, amounting to \$15,106 is similar to the last above-mentioned stock, being assigned to the association as security on payments of installments upon contracts of sale, instead of repayment of loans. [23]

The other classes of stock are installment stocks, the holders thereof making monthly payment to the association. Class F stock (schedules 23 and 44), amounts to \$291,087.48. Classes A, E and G (pages 45 and 46), amount to \$15,503.65. Class I (pages 47, 48), amounts to \$27,341.90. The total of install-

ment stock is \$339,932.83. I refer to these classes of stock to show the character of the business transacted.

Mr. Corbin has been general manager for many years, and Mr. Gavin McNab its principal attorney. It is obvious that the great body of stockholders do not take in active part in the details of the business. As in other large financial institutions, policies and business management of the concern are left to its officers whose duties and obligations are fixed by law. In this case, at the time of the filing of the petition the board of directors consisted of Mr. Corbin, its general manager, Mr. McCullough, its president; A. H. Jarman, George W. Mordecai and N. Schmulo-witz; the three last-named being attorneys and associates of Mr. Gavin McNab. counsel for the association. It is my opinion that when such an institution, so managed and controlled, invokes the jurisdiction of the bankruptcy court to liquidate its affairs, a fair and impartial administration, including an investigation into the acts of the officers, if such investigation becomes necessary, requires that the trustee chosen shall be free from alliance with the corporation or any of its officers or attorneys, and that the officers and attorneys take no part in the selection of the trustee.

A further reason why in this case this should be strictly enforced is that since the association suspended active business, a partial liquidation has been had under the direction of its officers, as appears from the circular letter of August 5, 1915, sent out by the directors to the stockholders, announcing [24]

the filing of the petition herein, and which contains the following:

“Dear Sirs: Your Board of Directors enclose herewith, a statement of affairs of your association. Since the attacks, made upon the Association by Building & Loan Commissioner Walker—the righteousness of which attacks was denied by the Courts in judgments adverse to the Commissioner—your Board of Directors deemed it unwise to transact new business, as continual official hostility would have made such course unprofitable to the stockholders.

Expenses were reduced as far as possible, and every effort was made to expedite liquidation. During this time there has been paid to the stockholders, in the order provided by law, over five hundred thousand dollars. As the assets of the corporation are in long-term mortgages, which cannot be called, and real estate, we consider this excellent progress.

We call the stockholders' attention to the fact that Commissioner Walker and his accountant stated that the Continental was insolvent, yet since these attacks were made the Association has paid out over Five Hundred Thousand Dollars, and has assets of more than Eight Hundred Thousand Dollars left, which will, properly administered, pay dollar for dollar to each stockholder.”

Respectfully submitted:

San Francisco, California, September 30th, 1915.

ARMAND B. KREFT,

Referee in Bankruptcy.

The order reviewed is entered in the record to the effect that the election of the Anglo-California Trust Company was disapproved. The ruling also appears on page 39 of the transcript transmitted herewith.

The following papers are transmitted herewith:

Petition to review.

Transcript of testimony and proceedings.

Exhibits "A" to "J."

ARMAND B. KREFT,

Referee in Bankruptcy.

[Endorsed]: Filed Oct. 2, 1915, at 11 o'clock and 45 min. A. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [25]

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*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 9509.

In the Matter of CONTINENTAL BUILDING &  
LOAN ASSOCIATION,

In Bankruptcy.

**Opinion and Order affirming Order of Referee Dis-  
approving Selection of Trustee.**

N. SCHMULOWITZ, Esq., Attorney for Petitioner.

The Continental Building and Loan Association was upon its own application adjudicated a bankrupt on August 9th, 1915. On August 30th, 1915, the creditors appeared by proxy before the referee for the purpose of electing a trustee. The trustee selected at that time was not approved by the

referee and another election was held on September 15th, 1915. At this election the Anglo-California Trust Company was chosen, but the selection was disapproved by the referee. The order disapproving this selection has been brought here for review. There is also brought here for review the action of the referee in permitting the shareholders of the bankrupt to vote as creditors for the trustee, and the refusal of the referee to permit the Merchants National Bank, which has a claim against the bankrupt for money loaned to it, to select the trustee, as being the only creditor, within the meaning of the bankrupt act, that appeared and offered to vote at the meeting. The amount of the latter's claim is \$2,611.20, while the claims of the shareholders voting at this election aggregate \$522,437.50. The question as to whether the shareholders can be at the same time creditors is an interesting one, but under the peculiar circumstances of this case need not be definitely determined at this time. The adjudication was had upon the petition of [26] the corporation itself. The shareholders were named in the petition as creditors. If they are not creditors within the meaning of the bankrupt law, the corporation is not insolvent, as the only other claims amount to but \$12,198.90, while the assets of the corporation are scheduled at \$769,508.13. If therefore the shareholders are eliminated as creditors we have these vast assets with which to pay debts of \$12,198.90. No one interested has made any objection to the adjudication and so long as it stands, based on the theory that the shareholders

are creditors, they must be regarded as creditors for all purposes. The Merchants National Bank will be paid in full, whatever happens to the shareholders' claims, and the order denying it the right to select the trustee is affirmed. The selection of the Anglo-California Trust Company was disapproved by the referee, because he found that the selection had been influenced, if not brought about by the officers of the bankrupt, and the attorneys for the bankrupt. His action in so doing is affirmed.

November 9th, 1915.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Nov, 9, 1915, At 3 o'clock and 10 min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [27]

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**Certificate of Clerk (U. S. District Court) to Certain Documents to be Used on Petition for Revision.**

I, W B Maling, clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing to be full, true and correct copies of Praecipe for Transcript, Petition for Review, Referee's Certificate on Petition to Review, and the Opinion and Order of this Court affirming the order of the referee in the matter of Continental Building & Loan Association, Bankrupt, No. 9509, as the same now remain on file and of record in this office; said copies having been prepared in accordance with the above mentioned Praecipe for Transcript.

I further certify that the cost for preparing and

certifying the foregoing copies (consisting of 27 pages, numbered from 1 to 27 inclusive) is the sum of Sixteen Dollars and Ten Cents (\$16.10) and that the same has been paid to me by the attorney for petition herein.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said District Court this 30th day of December, A. D. 1915.

W B. MALING,

By C. W. Calbreath,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled  
12/30/15. C. W. C.] [28]

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[Endorsed]: No. 2685. United States Circuit Court of Appeals for the Ninth Circuit. W. T. Wilson, Emil E. Lenguetin, Fred F. Connor, John A. Bloom, Lawrence Hobreht and Benj. F. Currier, Petitioners, vs. The Continental Building and Loan Association, a Corporation, et al, Respondents. In the Matter of Continental Building and Loan Association, Bankrupt. Transcript of Record in Support of Petition for Revision Under Section 24b of the bankruptcy act of Congress, Approved July 1, 1898, to Revise, in Matter of Law of a Certain Order of the United States District Court for the Northern District of California, First Division.

Filed December 31, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 2685

IN THE  
**United States Circuit Court of Appeals**

**For the Ninth Circuit**

W. L. WILSON, EMIL E. LENGUETIN, FRED  
F. CONNOR, JOHN A. BLOOM, LAWRENCE  
HOBRECHT and BENJ. F. CURRIER,

*Petitioners,*

vs.

THE CONTINENTAL BUILDING AND LOAN ASSO-  
CIATION (a corporation) et al.,

*Respondents,*

In the Matter of

CONTINENTAL BUILDING AND LOAN ASSOCIA-  
TION (a corporation),

Bankrupt.

**BRIEF ON BEHALF OF PETITIONERS.**

B. M. AIKINS,  
*Attorney for Petitioners.*

*Filed this.....day of March, 1916.*

FRANK D. MONCKTON, *Clerk.*

*By.....Deputy Clerk.*



No. 2685

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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W. L. WILSON, EMIL E. LENGUETIN, FRED  
F. CONNOR, JOHN A. BLOOM, LAWRENCE  
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THE CONTINENTAL BUILDING AND LOAN ASSO-  
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In the Matter of

CONTINENTAL BUILDING AND LOAN ASSOCIA-  
TION (a corporation),

Bankrupt.

## BRIEF ON BEHALF OF PETITIONERS.

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### Statement of Case.

Some time prior to August 9, 1915, The Continental Building and Loan Association filed a voluntary petition in bankruptcy with a schedule in which it named its stockholders as creditors. On August 9, 1915, it was adjudged a bankrupt, and all further proceedings were referred to Armand B.

Kreft, Esquire, Referee in Bankruptcy. The first meeting of creditors was held on August 30, 1915. At that meeting a large number of these stockholder-creditors appeared, and elected one B. G. Tognazzi their trustee. The Referee disapproved the election because he had had the active support of the directors of the bankrupt, and continued the meeting until September 15, 1915, when a new election was held and the Anglo-California Trust Company was elected. The other candidates were W. R. Williams, State Superintendent of Banks, and the Union Trust Company. The Anglo-California Trust Company had the support of four hundred three (403) claimants, whose claims aggregated about three hundred twenty thousand four hundred thirty-seven and 50/100 dollars (\$320,437.50); Williams had two hundred and two (202) claims aggregating about one hundred forty thousand dollars (\$140,000.00); and the Union Trust Company, one hundred and seven (107) claims aggregating about sixty-two thousand dollars (\$62,000.00). (Record p. 23.)

The only claimants who voted were the stockholders of the bankrupt corporation, who acquired the status of creditors, or quasi-creditors, by virtue of the bankruptcy proceedings and of the right to share in the proceeds of liquidation in proportion to their various payments upon their several stock subscriptions, most of the stock being payable in small, monthly installments.

Counsel representing the claimants who voted for Williams and the Union Trust Company thereupon objected to the election of the Anglo-California Trust Company on two grounds:

First: That said company was the depository of the bankrupt and had acted as trustee on its deeds of trust;

Second: That its election was brought about by activity on the part of the officers, directors and attorneys of the bankrupt (p. 23).

Upon these issues evidence was introduced, and thereafter the referee sustained the objection and for the second time disapproved the election of the majority candidate.

On September 27, 1915, the petitioners presented a petition for a review of the referee's order by the District Court (pp. 17-19). On October 2, 1915, the referee filed his certificate on petition to review (pp. 20-47). A hearing on the petition was had before the Hon. M. T. Dooling, D. J., who denied it on November 9, 1915. It is this order which your petitioners now seek to review.

The order is based squarely upon the ground that the selection of that company as trustee was

“influenced, if not brought about by the officers of the bankrupt, and the attorneys of the bankrupt”,

and ignores the contention that the Anglo-California Trust Company was disqualified by having been the depository of the deeds of trust of the bankrupt

or by having been named as trustee in deeds of trust securing its loans.

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### Assignment of Errors.

The following are the formal assignments of error contained in the record (pp. 17-19) on which petitioners rely:

“First. That the Anglo-California Trust Company was elected by a great majority of the creditors present or represented at said meeting, both in number of creditors and in the amount of their claim, but was without adequate cause disapproved.

“Second. That the Anglo-California Trust Company is not disqualified to act as a trustee by reason of its having acted as the depository of the securities of the bankrupt, if true; and that no proof was offered or made of such alleged fact, and the fact was not so found.

“Third. That said Trust Company is not disqualified to act as trustee by reason of its having acted as trustee under deeds of trust for the bankrupt, if true; and that no proof was offered of such alleged fact, and the fact was not so found.

“Fourth. That said Trust Company is not disqualified by reason of the necessity of the trustee herein to examine into the relation existing between the said company and the bankrupt, if true; and that no proof was offered of such alleged necessity, and the fact was not so found.

“Fifth. That the said Trust Company is not disqualified by reason of the counsel of the bankrupt being an attorney of the said company, even though true; and that no proof

was offered or made of such fact, and that the fact was not so found and that such is not the fact.

“Sixth. That it is not true that the election of the said Trust Company was produced or brought about by activity on the part of the officers, directors and attorneys of the bankrupt.

“Seventh. That there was no evidence before the referee to show any activity on the part of the officers, directors and attorneys of the bankrupt, or any of them, to produce or bring about the election of said Trust Company.

“Eighth. That there was no evidence before the referee to show that any activity on the part of the officers, directors and attorneys, of the bankrupt, or any of them did in fact influence any of the creditors to vote for said Trust Company as such trustee.

“Ninth. That there was no evidence before the referee to show that such alleged activity did influence the votes of a sufficient number of creditors, if any, to change the result of the election.

“Tenth. That the evidence wholly fails to show that the persons whose alleged activity was deemed obnoxious by the referee were not all stockholders, with the same qualified status of creditors as those who opposed its election.

“Eleventh. That the decision of the referee in effect disfranchises the said officers and attorneys.

“Twelfth. That the said decision complained of in effect disfranchises the majority of the creditors for the benefit of the minority.

“Thirteenth. That the decision complained of constitutes an abuse of discretion on the part of the referee.”

### Brief of Argument.

Some apology is due to the court for the inability of petitioners to present the issues in as clear cut a manner as is desirable. Our excuse must be the very unusual practice followed in this case, which merits a word of explanation.

The unusual nature of the practice followed consisted in:

(1) The failure of the referee to make any finding of fact and to clearly certify the precise question for review;

(2) In including in his certificate an extended argument in support of his decision; and

(3) In admitting evidence outside of a creditors' meeting and after the original hearing had been terminated, after his order of disapproval had been made and after the petition to review had been actually prepared and filed.

1. The rules require a finding as well as an order.

"When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

General Orders in Bankruptcy, XXVII.

They also require a clear and distinct statement of the precise question for review.

“The referee is also distinctly and clearly to state and certify the precise question for review; *for the hearing will be confined to the questions involved in the issue tried.*”\*

Remington, Sec. 2858.

As before observed, no finding has been certified, and none was made, and in the absence of findings and of an exact statement of the question for review, it is only too evident that petitioners' task is not an easy one.

2. The certificate contains an extended argument with the citation of authorities and the discussion of rules which not only increases the burden of petitioners in securing a record, but further complicates the presentation of their arguments by reason of the obvious necessity of not permitting any of the referee's arguments to go unanswered, since they carry a force that they would not have coming from counsel. Hence they put us in the position of having to reply in an opening brief.

It is respectfully submitted that arguments have no place in such a document, which has been likened to a bill of exceptions.

Remington, Secs. 2857, 2858.

3. We are also somewhat embarrassed by the fact that the referee permitted the case to be reopened after the petition for review had been filed, for the reception of further evidence upon certain issues which, happily, do not seem to be of great importance.

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\* Italics ours throughout.

Following the presentation of our petition, the writer received a notice (of not more than an hour or two) from counsel for certain creditors who had objected to the Anglo-California Trust Company, that certain additional evidence would be introduced.\*

The writer appeared at the referee's office at the time indicated in the notice, as did counsel giving the notice, and found there Mr. Grant Cordray, trust officer of the Anglo-California Trust Company, who had been subpoenaed to testify before the referee, and after an informal discussion of the facts with Mr. Cordray, the stipulation referred to by the referee (p. 34) was entered into, at the request of counsel for respondents, *but subject to the objection that the issues having been made up*

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\* The notice was in letter form, as follows:

"Wednesday, September 29th, 1915.

"B. M. Aikins, Esq.,  
"Attorney at Law,  
"Mills Building,  
"San Francisco.

"In re Continental Building & Loan Association.

"Dear Sir:—

"I address you this communication because you appear in this matter as attorney for the creditors who are seeking to review the order of Referee Kreft disapproving the election of the Anglo California Trust Company as trustee.

"Please be notified that at 2 o'clock P. M. this afternoon I will introduce before the referee in bankruptcy evidence upon the following points:

"(1). That Gavin McNab is a director of the Anglo California Trust Company;

"(2). That Gavin McNab is the attorney for the Anglo California Trust Company;

"(3). That the Anglo California Trust Company holds the securities of the bankrupt;

"(4). That the Anglo California Trust Company is the trustee upon a large number of trust deeds now outstanding in which the bankrupt is the beneficiary;

"(5). That the Anglo California Trust Company receives deposits from the bankrupt.

"Yours very truly,

"Reuben G. Hunt."

*and the petition for review filed, no further evidence could be taken.*

These circumstances and the nature of the petitioners' objection to the evidence covered by the stipulation do not appear in the referee's certificate, but he explains the admission of the evidence after the closing of the case and the filing of the petition for a review, as follows:

“On offering testimony in support of his objection Mr. Hunt stated that he desired to show that Mr. McNab is a director of Anglo-California Trust Company, and that said company has acted as trustee for the Continental Building & Loan Association, but he needed a continuance to call witnesses for this purpose. I stated that if it became necessary to certify the matter to the Court I would permit him to complete this record in this respect. Being satisfied from the evidence already presented that Mr. Hunt's objection should be sustained, I concluded to decide the matter on the record as it then stood.”

The referee, as intimated, overruled the objection and admitted the evidence contained in the stipulation.

This explanation is made, as above intimated, to excuse what may seem to the court a want of precision in presenting the points which are in issue, and not in any sense as a criticism of the referee.

The referee has no discretion to disapprove the election of a trustee who is elected by a majority of creditors, both in number and amount, on account of the activity in his behalf of certain of the officers, directors, employees and other stockholders, where the only other creditors of the bankrupt are such, like themselves, in a secondary sense only, and this solely by reason of being stockholders or distributees.

1. AS TO THE RIGHT IN GENERAL OF CREDITORS TO SELECT  
THE TRUSTEE.

It will not be disputed that the majority of the creditors, in number and amount, have the right to select the trustee.

This right is created by the Bankrupt Act itself:

“The creditors of a bankrupt estate shall”  
\* \* \* appoint one trustee or three trustees  
of such estate.”

30 Stat. L. 557, Sec. 44.

and carries special weight by reason of its statutory origin.

“The statute gives to the creditors the right to elect a trustee. The selection of a trustee by the creditors ought not to be lightly set aside. He should be confirmed unless there is good reason to believe that the election was controlled in the interest of the bankrupt or by some influence opposed to the interests of the creditors, so as to imperil the fair and efficient administration of the estate.”

Loveland, p. 589.

## 2. AS TO THE RIGHT OF THE REFEREE TO DISAPPROVE.

The written authority for this right is found in Gen. Order No. XIII:

“The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge and he shall be removable by the judge only.”

This right is not arbitrary and can be exercised only for cause.

In re Kreuger, 196 Fed. 705;

In re Lazoris, 120 Fed. 716.

“It is to be remembered in all such cases that the choice of a trustee is lodged by the law with the creditors constituting a majority in number and amount, and that their selection is not to be interfered with, unless it clearly imperils the fair and efficient administration of the estate. I am not persuaded that there is any such danger in the present instance, and, if it should prove otherwise, the objecting creditors have their remedy by an application hereafter to remove.”

In re Blue Ridge Packing Co., 125 Fed. 622;

In re Syracuse Paper & Pulp Co., 164 Fed. 280.

Elsewhere it was held, after an extensive discussion of the authorities, that

“they establish the rule that the election of a trustee by the creditors is not to be disapproved, unless there is good reason for believing that the election has been directed, managed, or controlled by the bankrupt or his attorney or by some influence opposed to the creditors’ interests.”

In re Eastlack, 145 Fed. 73.

The usual ground of disapproval is that the election of trustee was in fact brought about by the activity of the bankrupt or those in collusion with the bankrupt. Such was the fact in all of the cases cited by the referee in his certificate. Indeed we have found no case based upon any other ground.

It may be conceded, however, that this is not necessarily the only ground. It is conceivable that the trustee might be incompetent or inherently so unsuitable as to endanger the safety of the administration. But the showing would have to be a very strong one to warrant the disapproval of the trustee where there was no question of his being the real choice of the creditors, or, as said in *In re Henschel*, 111 Fed. 443.

“the emergency should not be a trivial one; it should be one of grave character and due weight.”

In this case objection was made to the Anglo-California Trust Company on two grounds, and on two grounds only:

Because its election was brought about by the activity of the bankrupt's officers, and because it had acted as trustee under and depository of the deeds of trust securing the investments of the bankrupt. There was no question of any grave emergency threatening the safety of the administration of the trust by the Anglo-California Trust Company.

### 3. AS TO THE PECULIAR STATUS OF THE CREDITORS HERE.

Before proceeding further with the argument, a statement should be made upon this point.

The situation is a very unusual one, as will immediately appear from the consideration that there are no true creditors to be taken into consideration, the only persons having the true status of creditors being so abundantly assured of the full payment of their claims as to exclude them from any part in the administration of the bankrupt estate.

The status, therefore, of every creditor who is entitled to participate in the election is more accurately that of a distributee entitled to participate in the proceeds of liquidation after the payment of the true creditors. As stated by the referee in his argument, they are corporate co-partners rather than technical creditors (p. 40), citing *Towle v. American Building Loan and Investment Co.*, 61 Fed. 466 (Grosscup, D. J.), which, it may be noted in passing, was a suit in equity involving a liquidation, not a bankruptcy proceeding.

The learned District Judge below seems to have entertained some doubt as to the right of anyone to vote at the election of trustee, the only true creditors being eliminated by the richness of the bankrupt's estate, but concluded that the question whether stockholders can be at the same time creditors was unnecessary of determination, since:

“No one interested has made any objection to the adjudication and so long as it stands, based on the theory that the stockholders are

creditors, they must be regarded as creditors for all purposes" (p. 48).

Their status, therefore, is fixed by acquiescence. They are creditors by estoppel.

But upon whatever theory they are to be deemed as creditors and entitled to vote for a trustee, it is most important to keep in mind *that they are all creditors because they are stockholders, that they all occupy the same status, and that "they must be regarded as creditors for all purposes."*

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**4. THE RULE AGAINST PERMITTING THE BANKRUPT TO CONTROL THE ELECTION OF TRUSTEE CAN APPLY IN THE NATURE OF THINGS ONLY WHEN THE CREDITORS AND THE BANKRUPT ARE NOT IDENTICAL.**

The referee insists in his certificate (p. 36) that the courts have uniformly refused to approve of trustees chosen through the influence of officers of, or attorneys for the bankrupts. In support of this proposition he cites many cases (pp. 36-37). These cases have all been examined and in every one of them there were true creditors whose interests were distinct from those of the various bankrupts, the creditors not being identical, as here, with the bankrupt.

The doctrine they teach is that the creditors, and they alone, have the right to select the trustee, and that if the election is not in fact that of the creditors, but is brought about in the interest of the bank-

rupt, by its officers, attorneys, or stockholders, the referee may disapprove.

The foundation of the creditors' right of selection is, as we have already seen, the statute. And the rule that the trustee must not be selected through the influence of the bankrupt, its officers, attorneys, or stockholders, is merely a negative outgrowth of the statute limiting the right of selection to the creditors. It is, therefore, a rule in aid of the statute, designed to give effect to it, not to defeat it.

In applying this rule the courts have repeatedly drawn attention to the necessity of protecting the creditors against the bankrupt, and have refused to approve elections accomplished in the interest of the bankrupt by the activities of its officers, directors, employees or stockholders.

The reason of the rule is therefore to assure to the creditors their statutory right of selection in order to protect them against the bankrupt.

In this case, however, it must be evident that no such reason can exist. The creditors are all stockholders and are creditors solely by reason of being stockholders and are all "entitled", as stated by the referee, "to their proportionate share of the profits, if any" (p. 42). How then can there be room here for any distinction between creditor and bankrupt? An election accomplished in the interest of the bankrupt as against that of the creditors is an obvious absurdity where creditors and the stockholders are identical.

Moreover, the application of the rule in this case is not possible. For the cases make no distinction between the activities of officers, directors, attorneys or stockholders (Remington, Sec. 888), the forbidden thing being the activity of any of these persons in the interest of the bankrupt and against the interest of the creditors. The rule must therefore be applied, if at all, against stockholders as well as those connected with the management of the corporation. But all of the respondents in this case (except The Merchants National Bank) are stockholders, and the contest for trustee was simply a contest between three groups of stockholders, and it is clear that no such spirited contest could take place among so many creditors without the existence of activity in each of these groups. Such an election cannot be conducted by silent prayer. Co-operation is necessary. And if none of the stockholders may suggest and canvass the trustee of his choice it is clear that there never can be any election at all, since all are stockholders. Yet in this case the largest group of electors, representing a clear majority over both of the others, both in number and amount, is denied its choice of trustee because among its numbers are found certain stockholders who were directors and officers of the "corporate copartnership" and who advocated the election of the same trustee. They were the "agents" of every stockholder (p. 40) and had been chosen for many years by the majority of the stockholders (p. 45), (treated here as credit-

ors by a species of estoppel) as their trusted agents to manage their affairs. And this very expression and proof of confidence on the part of those who are entitled to select the trustee is, by the false, and be it noted the *partial*, application of a rule which was not devised and never could have been devised, for such a case, made the instrument of defeating the purpose of the statute, to wit, the will of the majority. To apply the rule *to all* of the stockholders in each of the three groups, as it should be applied, if at all, would be impossible because in such a case no trustee could ever be selected free from the taint of activity of stockholders.

Again. Respondents' contention, if sound, would bring us to this: that those particular stockholder-creditors who were officers and attorneys for the bankrupt may, by advocating the candidacy of any nominee, not only defeat him, but deny to the majority of the creditors who participate in his choice their statutory right to elect him.

That the decision complained of is a much strained application of a rule, the sole purpose of which is to protect the rights of the creditors as against the stockholders, must necessarily appear, also, not only from the fact that (1) such a rule could never have arisen unless the bankrupt and the creditors were different persons with divergent interests, and also from the fact (2) that the persons who were denied the right of participating in the campaign for trustee occupy the same status as all others interested and "must", therefore, in the

language of the learned District Judge, "be regarded as creditors for all purposes"; but from the further consideration (3) that the true creditors of the bankrupt being disregarded, this proceeding amounts in effect to a liquidation for the benefit of the stockholders and not to a true bankruptcy proceeding, the objects and purposes of which are twofold:

"First, to secure possession of an insolvent's assets and procure their equitable division among creditors, preventing and avoiding attempts of one creditor to obtain advantage over other creditors therein; and second, to free the worthy debtor from the burden of unpaid debts" (Remington, Sec. 17);

and that the people of this state have repeatedly determined that the proper persons to liquidate the affairs of a corporation are the very persons who were here denied the rights of every other person occupying the same status.

"§ 400. CORPORATIONS, DIRECTORS, TRUSTEES OF CREDITORS, WHEN DISSOLVED, EXCEPT. Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation."

Civil Code, Sec. 400;

Stats. 1850, Sec. 16 (p. 349).

So also, where a corporate charter is forfeited for non-payment of license tax.

“In all cases of forfeiture under the provisions of this act, the directors or managers in office of the affairs of any domestic corporation, whose charter may be so forfeited, or of any foreign corporation whose right to do business in this state may be so forfeited, are deemed to be trustees of the corporation and stockholders or members of the corporation whose power or right to do business is forfeited and have full power to settle the affairs of the corporation” etc.

Stat. 1915, Sec. 13, p. 427;

or for non-payment of franchise tax.

Stat. 1913, Sec. 24, p. 7;

Stat. 1913, Sec. 24a, p. 625.

Under these statutes it has been held that it is only where the directors or other officers have been guilty of fraud that the courts have the right to appoint a receiver.

Havemeyer v. Supreme Court, 84 Cal. 327;

Clark & Marshall on Private Corp., Sec. 334e.

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5. EVEN IF THE RULE WERE APPLICABLE IT COULD NOT PREVENT THE STOCKHOLDERS, DIRECTORS AND OFFICERS OF THE ASSOCIATION FROM PARTICIPATING IN THE ELECTION OF TRUSTEE OR EXPRESSING THEIR PREFERENCE, NOR COULD IT BE EXTENDED TO OTHERS SIMPLY BECAUSE THE OTHERS FAVORED THEIR CHOICE OF A TRUSTEE.

The rulings of the referee do not stop at the contention that the election must not be brought about by the officers of the bankrupt. In disapproving

the first election of trustee, Mr. B. G. Tognazzi, he said "that Mr. Tognazzi could not be a candidate again" (p. 21); that the former president of the company, who is "a creditor for all purposes", *must not participate in a general meeting of other stockholder-creditors*, and insisted that they "choose a trustee *without suggestion* of the attorneys, officers or directors of the bankrupt" (p. 22); that they "must choose a disinterested person", (whatever that they may mean where the identity of the creditors is merged in that of the bankrupt) (p. 35); that even "if the majority of the stockholders so desire" they should not have the right to direct that the liquidation be conducted by their officers (p. 43) or by any one suggested by their officers (*supra*) and directed "that the officers and attorneys *take no part\** in the selection of the trustee" (p. 45).

He also excludes all stockholders who think well of their management.

"Mr. Bradford, who was chairman of the meeting at which Mr. Leonard was chosen, testified in effect that he is still of the opinion that Mr. Corbin and Mr. McNab should conduct and lead the liquidation of its concern. While Mr. Bradford is entitled to this view, *he is in my opinion not a proper person to lead the creditors in this matter*, in view of the instructions of the referee that the officers and attorneys of the bankrupt must hold hands off in this election." (p. 36.)

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\*Italics ours in all cases.

Mr. Bradford was neither an officer nor an attorney, just a stockholder, to be "deemed a creditor for all purposes."

Thus the rule against the activity of the bankrupt, its officers, directors, attorneys and stockholders, has been applied in this case both against officers, directors and attorneys, and also against those of the stockholders whose views agreed with theirs and who supported the same candidate favored by them, but against no others, and, further, the rule has been extended to exclude them also from "taking part in the election" of the trustee or from even "suggesting" the name of a trustee.

Yet even in an ordinary bankruptcy, where the bankrupt and the creditors are not identical and an election in the interest of the bankrupt is not an obvious impossibility, directors, officers and stockholders who are bona fide creditors may take part in the election of trustee and may suggest the trustee.

In re L. W. Day & Co., (C. C. A.) 178 Fed. 545;

In re Ployd, 183 Fed. 791;

In re Syracuse Paper & Pulp Co., 164 Fed. 275;

In re Blue Ridge Packing Co., 125 Fed. 620.

In re Eastlack (*supra*) is a case not unlike the present one, except as to the identity of debtor and creditor. In that case, to quote from the syllabus:

"A debtor stated at a meeting of his creditors that he intended to file a petition in bank-

ruptcy as the best way of liquidating, and that if a person whom he desired could be elected trustee, he thought his estate would pay in full and leave a surplus for himself, and he asked his creditors present to support such person, to which they agreed. After his petition had been filed, a movement having been made by certain creditors to elect a different trustee, and letters having been sent out to creditors in that behalf, a letter was prepared by the bankrupt's attorney which was signed and sent out by a large creditor advocating the election of the bankrupt's candidate. At the creditors' meeting a very large majority of the creditors both in number and in amount of claims voted for such person; so far as appeared without further solicitation on the part of the bankrupt or his attorney, about half of them in number, and three-fourths in amount of claims, being present and voting in person. *Held*, that the facts stated did not justify the referee or court in refusing to approve the election, in the absence of anything showing that it would be detrimental to the interest of any creditor."

The same case is also authority for the proposition that a mere attempt to influence an election is not sufficient unless it has actually had that result.

*Id.* 74.

In this case as in the Eastlack case, there was not one word of evidence to show that any of the creditors who voted for the majority candidate was actually influenced by any of the acts of the bankrupt's directors and attorneys.

We respectfully submit, therefore, that the referee has not only applied a rule in this case which can have no application under the peculiar facts

of this case, but that he has applied it as against one group of stockholders only, and that he has applied it with a rigor and severity not to be found in any single reported case.

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**6. THE RULE AGAINST THE ACTIVITY OF THE BANKRUPT IS FOR THE BENEFIT OF THE CREDITORS AND NOT OF THIRD PARTIES.**

This requires no argument. Yet a close reading of the certificate will, as we believe, show that the referee has attempted to apply the rule out of consideration for certain state authorities who have absolutely no interest in the administration.

Let us examine the reasons given by the referee for his decision. Why must the rule be applied as he has applied it? Because, he says, building and loan associations "have developed commercially" (p. 43), and "the office of Building and Loan Commissioner is established by law, to examine into the affairs of such concerns" \* \* \* "for the protection of the public dealing with them" (p. 43), and "a fair and impartial administration, including an investigation into the acts of the officers, if such investigation becomes necessary, requires the trustee chosen shall be free from all alliance with the corporation or any of its officers or attorneys, and that the officers and attorneys take no part in the selection of the trustee" (p. 45). It is not quite easy to understand what is meant by the necessity of a "fair and impartial" administration as between creditors and bankrupt

where, as here, they are identical. Nor do we see either reason or logic in requiring the choice of a trustee "free from all alliance with the corporation or any of its officers or attorneys" where the corporation is "in the nature of a corporate co-partnership" and its co-partners are themselves the creditors and the only creditors and have themselves selected their officers and attorneys.

The referee's remarks, therefore, referring as they do to the protection of the public and the duties of the Building and Loan Commissioner in examining into the affairs of such concerns, are eloquent of a confusion of ideas, especially when taken in connection with the fact that no charges of unfairness were made against any of the officers by any of the creditors or any one else, and that the referee embodies in his certificate the complete text of a letter sent by the directors to the stockholders wherein they complained of persecution by certain state authorities.\*

\*The letter is as follows:

"Dear Sirs: Your Board of Directors enclose herewith, a statement of affairs of your association. Since the attacks, made upon the Association by Building & Loan Commissioner Walker—the righteousness of which attacks was denied by the Courts in judgments adverse to the Commissioner—your Board of Directors deemed it unwise to transact new business, as continual official hostility would have made such course unprofitable to the stockholders.

"Expenses were reduced as far as possible, and every effort was made to expedite liquidation. During this time there has been paid to the stockholders, in the order provided by law, over five hundred thousand dollars. As the assets of the corporation are in long-term mortgages, which cannot be called, and real estate, we consider this excellent progress.

"We call the stockholders' attention to the fact that Commissioner Walker and his accountant stated that the Continental was insolvent, yet since these attacks were made, the Association has paid out over Five Hundred Thousand Dollars, and has assets of more than Eight Hundred Thousand Dollars left, which will, properly administered, pay dollar for dollar to each stockholder."

This letter was introduced, with several others, for the sole purpose of showing the activity of the directors in the election and not for that of showing any unfairness of the management towards any of the stockholders, which was not an issue, and even if it can be considered for any purpose except that for which it was introduced, it shows only, and that by inference, that certain attacks had been made by the state authorities upon the bankrupt association in the courts, wholly outside of this proceeding, and while it was a going concern and subject to the jurisdiction, within legal bounds, of those authorities, and that the attacks were successfully resisted by the association, that they involved charges of insolvency and so injured the business of the association as to make its continuance as a going concern unprofitable. Assuming the truth of these statements, what could be more natural than to seek protection through the liquidation of the company's business in the federal courts, which have so often furnished a harbor of refuge from tyranny and oppression?

This is further emphasized by the fact that the State Superintendent of Banks entered the campaign for trustee. All of these circumstances combine to show a confusion in the mind of the referee and that his ruling, which, we respectfully submit, was not justified upon any theory of protecting the creditors in their statutory right of selection, or of impartiality as between bankrupt and creditor, was in fact based upon some idea of impar-

tiality as between the bankrupt's former managers and those state authorities whose rights of "regulating their conduct" (i. e., the methods of *conducting business* by building and loan associations) "in this state" (p. 43) were, as is evident from the letter in question, the subject of a bitter controversy terminated by the courts adversely to the contentions of the state officials.

It is too obvious for argument that the jurisdiction of the Building and Loan Commissioner does not extend to bankruptcy proceedings; that the necessity of "regulating the conduct" of such associations "for the protection of the public dealing with them" cannot exist when they have ceased to do business; and that a rule devised for the benefit of the creditors cannot be turned against them and that they cannot be made to yield their statutory right of selecting a trustee of their own, either by hunger for power or hope of revenge on the part of state officials who have been balked by the courts from saddling their will upon the bankrupt corporation.

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**7. THE MERE FACT THAT A PARTIAL LIQUIDATION OF THE AFFAIRS OF A MUTUAL ASSOCIATION WAS EFFECTED BY ITS OFFICERS PRIOR TO THE PETITION IN BANKRUPTCY HAS NO BEARING UPON ANY OF THE QUESTIONS INVOLVED.**

The other reason given by the referee for disapproving the election is (p. 45) that "a partial

liquidation has already been had under the direction of" the officers of the bankrupt. No issue of this kind was involved in the hearing, and the writer must frankly admit his inability to see what possible bearing it has upon the right of the majority of the creditors to select a trustee. Moreover, the only proof of the partial liquidation was by way of inference from the letter above discussed, which was introduced by respondents in support of their objection that the association's officers had taken an active part in the selection of the trustee, and it was utterly without any suggestion of irregularity in the partial liquidation.

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### **As to the Trustee's Disqualifications.**

The only issues raised in this case were based upon the two objections of counsel for respondents already noted (record p. 23). The one already discussed, that the trustee's election had been brought about by activity on the part of its officers and attorneys; the other (a) that the trustee was the depositary of the bankrupt's deeds of trust, and (b) named as trustee therein.

(a) Not only was the evidence of these supposed disqualifications introduced over the protest of petitioners after they had filed their petition for review, but the points were disregarded by the District Judge, and are clearly not maintainable. For it is not easy to see how the present possession

of deeds of trust by a company elected as trustee, and which would, as trustee, be entitled to them, could disqualify it. To reach such a conclusion we would have to assume at the outset that it was dishonest, a thing which the respondents should be slow to do, since the Anglo-California Trust Company is, like the Union Trust Company, transacting business by the official approval, and under the direction of Mr. Williams, the state official who has placed himself in competition with both of them for the business of acting as trustee, the superintendence whereof has been committed to and undertaken by him in consideration of the annual payment to him of a portion of the taxes levied upon the people of the State.

Moreover, the possession of the deeds of trust is a matter of no consequence whatever since the notes secured thereby carry the security with them, and there is no contention that the notes are in the possession of the trust company.

(b) If the trustee is ineligible because named as such in the deeds of trust, i. e., because given a power of sale in case of delinquency on the part of borrowers, then it follows that there never could be a trustee where the moneys of a bankrupt were secured by mortgages containing a power of sale under Civil Code Sec. 2932.

The complete answer to both of these contentions is, however, that the statute has created no such disability. The only qualifications are com-

No. 2685

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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W. L. WILSON, EMIL E. LENGUETIN, FRED  
F. CONNOR, JOHN A. BLOOM, LAWRENCE  
HOBRECHT and BENJ. F. CURRIER,  
*Petitioners,*

vs.

THE CONTINENTAL BUILDING AND LOAN ASSO-  
CIATION (a corporation) et al.,  
*Respondents,*

In the Matter of  
CONTINENTAL BUILDING AND LOAN ASSOCIA-  
TION (a corporation),  
*Bankrupt.*

## BRIEF FOR RESPONDENTS.

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HELLER, POWERS & EHRMAN,  
HUGO D. NEWHOUSE,  
REUBEN G. HUNT,  
*Attorneys for Respondents,*

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*Filed this*.....*day of March, 1916.*

FRANK D. MONCKTON, *Clerk.*

*By*.....*Deputy Clerk.*



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## BRIEF FOR RESPONDENTS.

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### Statement of the Case.

(Italics are ours unless otherwise noted.)

While the statement of the case set forth in petitioners' brief is substantially correct, some material things have been omitted.

The bankrupt is a building and loan association formed under the laws of the State of California.

Its capital stock consists entirely of the dues paid in by its members together with the apportioned profits of the corporation (Trans. p. 39). These associations are essentially corporate partnerships. They have no functions except to gather together in small contributions sums large enough to justify loans and it is out of these loans that they make their profits (Trans. p. 40).

In their petition to this court, petitioners admit that the Continental Building and Loan Association was *duly* adjudged a bankrupt on August 9, 1915 (Trans. p. 1). "Duly adjudged" means that the association presented to the District Court a voluntary petition in bankruptcy in conformity with Official Form No. 2 prescribed by the Supreme Court of the United States by its General Order No. 38, promulgated in accord with the power conferred upon it by Section 30 of the Bankruptcy Act. The petition in bankruptcy in the case at bar, therefore, following this official form, set forth that: "The corporation owes debts which it is unable to pay in full," and was accompanied, in the form of exhibits, by a schedule of liabilities and assets. The only persons listed in these schedules as creditors, to whom the corporation owed these debts, were its shareholders (Trans. p. 48). There are other debts, amounting to \$12,190, owing to so-called "outside creditors", which are not set forth in the schedules, but which are conceded as entitled to priority of payment over the claims of the shareholder creditors (Trans. p. 48).

At the first meeting of creditors held before the referee in bankruptcy on August 30, 1915, T. C. Tognazzi was elected trustee through proxies solicited and voted by James McCullough, the president of the bankrupt corporation. This selection was disapproved by the referee on the ground that it had been brought about by the activity of the officers, directors and attorneys of the bankrupt, and he notified these officers, attorneys and directors that they would not be permitted to participate in the next election or influence claimants as to whom they should vote for in the choice of trustee (Trans. p. 31).

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### Brief of the Argument.

**I. The proceedings on review of the referee's order were regular and not unusual.**

**II. The finding of the referee, concurred in by the District Judge, that the election of the Anglo-California Trust Company was accomplished through the efforts of the officers and attorneys of the bankrupt, cannot be questioned upon a petition to revise.**

Whitla & Nelson v. Boyd, (C. C. A., 9th Cir.)

213 Fed. Rep. 587, 588; 32 Am. B. R. 469, 470;

Good v. Kane, (C. C. A., 8th Cir.) 211 Fed. Rep. 956, 958; 32 Am. B. R. 21;

In re Dorr, (C. C. A., 9th Cir.) 196 Fed. Rep. 292, 294; 28 Am. B. R. 505, 506;

Ohio Valley Bank v. Mack, (C. C. A., 6th Cir.) 20 Am. B. R. 40; 163 Fed. Rep. 155.

III. The liquidation of the bankrupt corporation is not a liquidation between persons constituting the corporation, rather than a liquidation between a bankrupt and its creditors, because, upon the adjudication, the status of the shareholders changed to that of creditors.

In re Hanson, 156 Fed. Rep. 717, 718; 19 Am. B. R. 235, 237.

IV. The rule that officers and attorneys of the bankrupt must not interfere in the election of a trustee, is based upon substantial reasons, which apply in this case as well as in other cases.

In re John F. McGill, 106 Fed. Rep. 57; 5 Am. B. R. 155, 161;

In re Rekersdres, 108 Fed. Rep. 206; 5 Am. B. R. 811;

Falter v. Reinhard, 4 Am. B. R. 782;

In re Henschel, 109 Fed. Rep. 861; 6 Am. B. R. 305;

In re Dayville Woolen Co., 114 Fed. Rep. 674; 8 Am. B. R. 85;

In re Gordon Supply Manufacturing Co., 129 Fed. Rep. 622; 12 Am. B. R. 94;

In re Cooper, 135 Fed. Rep. 196; 14 Am. B. R. 320;

In re Hanson, 156 Fed. Rep. 717; 19 Am. B. R. 237;

In re Sitting, 182 Fed. Rep. 917; 25 Am. B. R. 685;

In re Van De Mark, 175 Fed. Rep. 287; 23 Am. B. R. 760;

In re Wink, 206 Fed. Rep. 348; 30 Am. B. R. 298;

In re Morris, 154 Fed. Rep. 211; 18 Am. B. R. 828;

In re Ployd, 183 Fed. 791; 25 Am. B. R. 196.  
Civil Code Cal., Secs. 3510, 3511;

In re Forestier, 222 Fed. Rep. 537, 538;  
35 Am. B. R. pages 51, 52;

In re Rekersdres, 108 Fed. Rep. 206; 5 Am. B. R. 811;

Williams on Bankruptcy, 9th Ed. 85.

**V. The majority creditors have not been deprived of the right to select a trustee, but must not, as against the objecting minority, select a trustee connected with the former management of the bankrupt, either directly or indirectly.**

Gordon Supply & Manufacturing Co., 129 Fed. Rep. 622; 12 Am. B. R. 94;

Woodman's "Law of Trustees in Bankruptcy", Chap. 1, Sec. 11.

**VI. Even if the election had not been directed, managed or controlled by the officers of the bankrupt, the Anglo-California Trust Company was disqualified because it is the trustee under all the deeds of trust securing the bankrupt's loans.**

Williams on Bankruptcy, 9th Ed., 85;

In re Forestier, (D. C. Cal.) 222 Fed. Rep. 537, 538; 35 Am. B. R. 51, 52;

In re Schulz (D. C. Nor. Dist. Cal., decided May 21, 1915);

In re Clay, 192 Fed. Rep. 830, 833; 27 Am. B. R. 715, 719.

VII. To disqualify a candidate for trustee it is not necessary to show that the activity of the bankrupt actually influenced the creditors—the activity of the bankrupt is enough.

Remington on Bankruptcy, 2nd Ed., Vol. 1, Sec. 887.

VIII. Directors, officers and stockholders of ordinary corporations cannot even vote their individual claims for trustee where there has been collusion or improper influence.

Remington on Bankruptcy, 2nd Ed., Vol. 1, Sec. 887.

IX. Petitioners do not show that they were in anywise prejudiced by the order of which they complain.

X. The referee's ruling was not made for the benefit of anyone other than the stockholders themselves.

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## I.

### THE PROCEEDINGS ON REVIEW OF THE REFEREE'S ORDER WERE REGULAR AND NOT UNUSUAL.

Petitioners commence their brief by stating (Petitioners' Brief, p. 6):

“Some apology is due to the court for the inability of petitioners to present the issues in as clear cut a manner as possible. Our excuse must be the very unusual practice followed in

this case, which merits a word of explanation. The unusual nature of the practice followed consisted in: (1) The failure of the referee to make any finding of fact and to clearly certify the precise question for review; (2) In including in his certificate an extended argument in support of his decision; and (3) In admitting evidence outside of a creditors' meeting and after the original hearing had terminated, after his order of disapproval had been made and after the petition to review had been actually prepared and filed."

Petitioners, however, fail to show wherein they were in any wise prejudiced by these "unusual practices", and an examination of the record will show that petitioners' statement is based upon false premises.

(1) In the first place, the referee, in his certificate, after summarizing the evidence, did make a finding of fact when he stated (Trans. p. 37):

"In my opinion the evidence shows that the officers and attorneys of the bankrupt have dictated the steps leading up to the choice of the Anglo-California Trust Company and evidences a determination on their part to control the administration of this estate in this court."

Judge Dooling put it in another form when he stated in his opinion (Trans. p. 49):

"The selection of the Anglo-California Trust Company was disapproved by the referee because he found that the selection had been influenced, if not brought about, by the officers of the bankrupt and the attorneys for the bankrupt."

The petition for review filed by petitioners with the referee sets up (Trans. p. 17) thirteen alleged errors. In his certificate, the referee does not, it is true, certify each one of the questions presented by these assignments of error, but he consolidates the alleged errors into one question, which is clearly set forth in certificate (Trans. pp. 42-46) and that is: Conceding that ordinarily officers and attorneys of bankrupts cannot influence the appointment of their trustees, does this rule apply in a proceeding of this kind where the shareholders, who are the creditors, themselves chose these officers and attorneys: there being no capital stock other than the dues paid in by the shareholders together with the profits, does not this proceeding partake more of a liquidation between the persons constituting the bankrupt corporation than a liquidation between a bankrupt and its creditors? The entire argument of petitioners in their brief is built up around this question, and so, evidently, petitioners had little difficulty in ascertaining the precise question for review set forth in the referee's certificate.

(2) As to the second so-called "unusual practice", it is quite the common practice for referees to include in their certificates extended arguments in support of their decisions. The books are full of cases where such certificates have been quoted with approval by appellate courts. Petitioners

claim that such a course complicates the presentation of their arguments, by reason of the obvious necessity of their not permitting any of the referee's arguments to go unanswered, thus putting them in the position of having to reply in an opening brief. It occurs to us that, instead of *embarrassing* petitioners, the referee's argument in his certificate gives them a distinct advantage, in that it informs them in advance of the position that respondents must assume, and the cases upon which they must rely.

(3) The third unusual practice is refuted by petitioners' own quotation from the referee's certificate (Trans. p. 34):

"On offering testimony in support of his objection Mr. Hunt stated that he desired to show that Mr. McNab is a director of the Anglo-California Trust Company, and that said company has acted as trustee for the Continental Building & Loan Association, but he needed a continuance to call witnesses for this purpose. I stated that if it became necessary to certify the matter to the court I would permit him to complete the record in this respect. Being satisfied from the evidence already presented that Mr. Hunt's objection should be sustained, I concluded to decide the matter on the record as it then stood."

Surely there was nothing unusual or irregular about the referee's course in this respect.

## II.

THE FINDING OF THE REFEREE, CONCURRED IN BY THE DISTRICT JUDGE, THAT THE ELECTION OF THE ANGLO-CALIFORNIA TRUST COMPANY WAS ACCOMPLISHED THROUGH THE EFFORTS OF THE OFFICERS AND ATTORNEYS OF THE BANKRUPT, CANNOT BE QUESTIONED UPON A PETITION TO REVISE.

Petitioners, in their brief, do not attempt to attack this finding, although in one place they make the rather bald statement that there is not one word of evidence that any of the creditors who voted for the Anglo-California Trust Company were actually influenced by the acts of the bankrupt's directors and attorneys (Petitioners' Brief, p. 22 ).

Upon a petition to revise the Circuit Court of Appeals will consider questions of law only (*Whitla & Nelson v. Boyd*, C. C. A. 9th Cir., 213 Fed. Rep. 587, 588; 32 Am. B. R. 469, 470). Also, upon such a proceeding, findings of disputed questions of fact on conflicting evidence are not reviewable, although the question of law whether or not there was any substantial evidence to sustain such findings can be determined (*Good v. Kane*, C. C. A. 8th Cir., 211 Fed. Rep. 956, 958; 32 Am. B. R. 21).

That there was a conflict in the evidence presented to the referee, involving questions of credibility, appears from the record, although the overwhelming weight of the evidence is in favor of the referee's finding. This is not denied by petitioners. That there is an abundance of substantial evidence to sustain the finding, also appears from the record,

and this, too, is not denied by petitioners. So, therefore, the finding of the referee and the district judge that the election of the Anglo-California Trust Company was brought about by the activity of the officers and directors of the bankrupt, must be taken as established.

Even though the appellate court would consider questions of fact upon a petition to revise, it has been universally held that where the referee and the district judge have concurred upon findings of fact based upon conflicting evidence they will not be reversed except for plain error (*In re Dorr*, C. C. A. 9th Cir., 196 Fed. Rep. 292, 294; 28 Am. B. R. 505, 506). This rule is fully discussed by Circuit Judge Lurton in the case of *Ohio Valley Bank v. Mack* (C. C. A. 6th Cir.), 20 Am. B. R. 40; 163 Fed. 155, where he said:

“No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee’s findings of fact must be substantially that applicable to a master’s report. *Tilghman v. Proctor*, 125 U. S. 137; 8 Sup. Ct. 894; 31 L. Ed. 664; *Davis v. Schwartz*, 155 U. S. 631; 15 Sup. Ct. 237; 39 L. Ed. 289; *Emil Kiewert & Co. v. Juneau*, 78 Fed. 708; 24 C. C. A. 294; *Tu River Co. v. Brigel*, 86 Fed. 818; 30 C. C. A. 415. Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a

conclusion as the referee. *But, if the finding is based upon conflicting evidence involving questions of credibility, and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon review, should not disturb his findings unless there is most cogent evidence of a mistake and miscarriage of justice.* Loveland on Bankruptcy, section 32a; In re Swift (D. C. Mass.), 9 Am. B. R. 237; 118 Fed. 348; In re Rider (D. C. N. Y.), 3 Am. B. R. 178; 96 Fed. 811; In re Waxelbaum (D. C. Ga.), 4 Am. B. R. 120; 101 Fed. 228; In re Stout (D. C. Mo.), 6 Am. B. R. 505; 109 Fed. 794; In re Miner (D. C. Oreg.), 9 Am. B. R. 100; 117 Fed. 953. In this case the conclusions of the referee necessarily involved the credibility of the witnesses who testified to the bona fides of the claim preferred by Charles Mack, Sr. *The conclusion he reached in favor of the validity of his debt has also passed the scrutiny of the district judge. Under such circumstances, this court is not warranted in overturning the conclusions of two courts upon anything less than a demonstration of plain mistake."*

Lest there be any doubt as to the substantial and sufficient character of the evidence in the record to support the referee's finding, let us briefly review the same, bearing in mind that practically all of the evidence had to be extracted from hostile witnesses.

At the first session of the creditors on August 30, 1915, T. G. Tognazzi was elected trustee upon claims voted for him through proxies obtained for that purpose by James McCullough, the president of the bankrupt corporation. His election was disap-

proved by the referee on the ground that it had been brought about by the activity of the officers, directors and attorneys of the bankrupt, and the referee notified these directors, officers and attorneys that they would not be permitted to participate in the next election or influence claimants as to whom they should vote for in the choice of trustee (Trans. p. 21). No review was taken of this order of the referee, but within twenty-four hours thereafter a meeting of the directors of the bankrupt was held at which Mr. James McCullough, the president of the bankrupt, Mr. Mordecai, a director and a legal associate of Mr. McNab, the chief counsel of the bankrupt, Mr. McNab himself, and Mr. Corbin, a director and the general manager of the bankrupt, were present. At this meeting it was decided to send out and obtain proxies from creditors in favor of Mr. Joseph A. Leonard (Trans. p. 25) for the next election on September 15, 1915. Mr. Leonard is the president and manager of a corporation of which Mr. McNab is a director and the attorney (Trans. p. 36).

Mr. McCullough thereupon notified all the stockholders by circular letter that he would call a meeting to select a new candidate for trustee but did not fix a time and place of meeting. He requested the stockholders, however, not to give their proxies to anyone until after the action taken at this meeting. A meeting was then held of a few stockholders in San Francisco, but it does not appear upon what notice or to whom notice was given, the Continental officers

having failed to enlighten the referee upon that point. This meeting agreed to solicit proxies for Mr. Leonard, the man selected by the directors; and Mr. McCullough thereupon notified all the stockholders to this effect (Trans. pp. 28 and 29). At this meeting, which was held upon extremely short notice, a committee was formed, and this committee, of which Wallace Bradford was chairman, sent out a circular letter to all stockholders requesting proxies to be given to Mr. Leonard and stating that before any trustee was decided upon the stockholders would be notified by mail of the reasons for the recommendation (Trans. p. 35). Mr. McCullough also sent out another circular letter notifying the stockholders of the action taken at the meeting and impliedly soliciting proxies for Mr. Leonard. Notice that these proxies would be voted for the Anglo-California Trust Company was not sent to the stockholders until the night preceding the election, which was to be held September 15, 1915, at 10 A. M. (Trans. p. 35). The Anglo-California Trust Company, for whom Leonard voted his proxies at this second election, is the trustee named in and holds the deeds of trust securing the loans made by the bankrupt. Mr. McNab is a director of the Anglo-California Trust Company and represents it from time to time as an attorney (Trans. p. 34). Notice of the selection of the Anglo-California Trust Company, as the candidate for trustee, was sent out to the stockholders by Mr. Corbin, the general manager of the bankrupt, on the night of September 14th (Trans. p. 30). Mr. Corbin testified that when

people asked his advice as to whom they would give proxies he told them to give them to Mr. Leonard. Mr. Osborn, a creditor, however, testified that Mr. Corbin solicited him to give his proxy to Mr. Leonard (Trans. p. 30). Mr. Leonard testified that he did not know who picked the Anglo-California Trust Company as the candidate, but that he called up the trust officer of the trust company because he had understood from him that the trust company had been requested to act. Mr. Leonard did not know who had requested the trust company to act as trustee (Trans. p. 31). Nor did Mr. Bradford know (Trans. pp. 32 and 33). Mr. Bradford, the chairman of the creditors' committee, is firmly of the opinion that Mr. McNab and Mr. Corbin ought to control the liquidation of the bankrupt's affairs in the bankruptcy court (Trans. p. 32).

Petitioners' attitude in their brief borders on the out and out claim that the referee abused his discretion when he disapproved the election of the Anglo-California Trust Company.

On the contrary, we believe that the referee was far too lenient and courteous under the circumstances. It is shown by the record, beyond question, that Gavin McNab is an attorney for and a director of the Anglo-California Trust Co.; that Mr. McNab is the chief counsel of the Continental Building and Loan Association, and has been so for many years; that Nat Schmulowitz, the attorney for the association in the bankruptcy proceeding, is an associate of Mr. McNab and a director of the bankrupt; that

George W. Mordecai, one of the directors, is an associate of Mr. McNab, and is the attorney for James McCullough, the president of the bankrupt; that A. H. Jarman, a director of the bankrupt, is an associate of Mr. McNab; that R. P. Henshall, the attorney for the Merchants' National Bank of San Francisco, which appears before this court in another proceeding wherein it seeks to control the election of the trustee, is an associate of Mr. McNab; that Mr. Leonard, the proxy holder who cast the vote for the Anglo-California Trust Co., is the president of a company of which Mr. McNab is a director and the attorney; and that all of these persons, with the exception of Jarman, made strenuous efforts to control the election, in conjunction with Mr. Wm. Corbin, who has been the general manager of the bankrupt for many years.

From these facts it is plain that Gavin McNab, and Wm. Corbin, who control the Continental in its life, do now endeavor to control it in its death; and we trust that this court will conclude, as did the referee and the district judge, that it is not for the best interests of the shareholder creditors, as a whole, to perpetuate, in the liquidation and final wind-up of the corporation, the control under whose management the Continental Building and Loan Association was compelled to seek the relief afforded by the bankruptcy court.

Even though the attorneys and officers of the bankrupt had nothing to do with the choice of the Anglo-California Trust Company, the referee well

says (Trans. p. 36) that he could not approve the choice because of the close business relations existing between Mr. Leonard, the proxy holder, Mr. McNab, the chief counsel of the bankrupt, and the trust company.

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### III.

**THE LIQUIDATION OF THE BANKRUPT CORPORATION IS NOT A LIQUIDATION BETWEEN PERSONS CONSTITUTING THE CORPORATION, RATHER THAN A LIQUIDATION BETWEEN A BANKRUPT AND ITS CREDITORS, BECAUSE, UPON THE ADJUDICATION, THE STATUS OF THE SHAREHOLDERS CHANGED TO THAT OF CREDITORS.**

The whole burden of petitioner's argument in their brief is based upon the proposition which is so well stated, and then refuted, by the referee in bankruptcy in his certificate (Trans. pp. 42-46):

“In view of the fact that the stockholders themselves choose the officers to manage their affairs, and that there is no capital stock other than the dues and sums paid in by the stockholders, there is much force in the contention that this proceeding partakes more of a liquidation between the persons constituting the bankrupt corporation than a liquidation between a bankrupt and its creditors, and that the usual rules governing relations between bankrupts and creditors do not apply; that the reason why bankrupts are not permitted to influence appointments of trustees is that the bankrupt's property passes from him, and he has no further interest therein, but remains subject to an examination and accounting to his creditors. He should, therefore, not have a voice in the naming of the person who is to investigate his acts; but in this case the identity of the bankrupt and the

creditors being one and the same, if the majority of the stockholders so desire, they should have the right to direct that the liquidation be conducted by their officers.

It is along this line of reasoning, I understand, that the officers and attorneys considered it proper for them to suggest a candidate for trustee, and to request the members to send authority to the president of the association to vote their claims.

I do not agree with this position, for the following reasons:

To assist members in building and paying for their homes was originally the primary object of building and loan associations, and the members took an active part in the management of the business. But such associations have developed commercially. Laws have been passed regulating their conduct in this state; the office of Building & Loan Commissioner is established by law, to examine into the affairs of such concerns—this, I take it, for the protection of the public dealing with them. An association, such as the Continental Building and Loan Association, having more than fifteen hundred members, with assets aggregating approximately a million dollars, is a great financial institution. The schedules herein show that it owes to Class C stockholders \$302,869. This stock does not represent monthly savings of its members, but is fully paid-up stock, paid in at the time the stock is issued. The member buying this class of stock receives a certificate with interest coupons attached, payable semi-annually and on which he receives 6 per cent on the money paid for his stock, but does not otherwise participate in the earnings of the association. This has all the features of a savings bank account paying 6 per cent interest (schedules, pages 4 to 22).

Class D stock, scheduled at \$46,013.34 as owing thereon, represents stock issued for money deposited subject to check drawn on the

association. This is substantially a commercial bank account (schedule, pages 59 to 61).

Class DC stock (schedules 49 to 55) is issued to borrowers and held by the association under assignment to it as security for repayment of loans. The DC stock referred to in pages 56 to 58, amounting to \$15,106 is similar to the last above-mentioned stock, being assigned to the association as security on payments of installments upon contracts of sale, instead of repayment of loans.

The other classes of stock are installment stocks, the holders thereof making monthly payment to the association. Class F. stock (schedules 23 and 44), amounts to \$291,087.48. Classes A, E and G (pages 45 and 46), amount to \$15,503.65. Class I (pages 47, 48), amounts to \$27,341.90. The total of installment stock is \$339,932.83. I refer to these classes of—stock to show the character of the business transacted.

Mr. Corbin has been general manager for many years, and Mr. Gavin McNab its principal attorney. It is obvious that the great body of stockholders do not take any active part in the details of the business. As in other large financial institutions, policies and business management of the concern are left to its officers whose duties and obligations are fixed by law. In this case, at the time of the filing of the petition the board of directors consisted of Mr. Corbin, its general manager; Mr. McCullough, its president; A. H. Jarman, George W. Mordecai and N. Schmulowitz; the three last-named being attorneys and associates of Mr. Gavin McNab, counsel for the association. It is my opinion that when such an institution, so managed and controlled, invokes the jurisdiction of the bankruptcy court to liquidate its affairs, a fair and impartial administration, including an investigation into the acts of the officers, if such investigation be-

comes necessary, requires that the trustee chosen shall be free from alliance with the corporation or any of its officers or attorneys, and that the officers and attorneys take no part in the selection of the trustee.

A further reason why in this case this should be strictly enforced is that since the association suspended active business, a partial liquidation has been had under the direction of its officers, as appears from the circular letter of August 5, 1915, sent out by the directors to the stockholders, announcing the filing of the petition herein, and which contains the following:

“Dear Sirs: Your Board of Directors enclose herewith a statement of affairs of your association. Since the attacks, made upon the Association by Building and Loan Commissioner Walker—the righteousness of which attacks was denied by the courts in judgments adverse to the Commissioner—your Board of Directors deemed it unwise to transact new business as continual official hostility would have made such course unprofitable to the stockholders.

Expenses were reduced as far as possible, and every effort was made to expedite liquidation. During this time there has been paid to the stockholders, in the order provided by law, over five hundred thousand dollars. As the assets of the corporation are in long-term mortgages, which cannot be called, and real estate, we consider this excellent progress.

We call the stockholders' attention to the fact that Commissioner Walker and his accountant stated that the Continental was insolvent, yet since these attacks were made the Association has paid out over five hundred thousand dollars, and has assets of more than eight hundred thousand dollars left, which will, properly administered, pay dollar for dollar to each stockholder.’ ”

This argument of petitioners, however, overlooks the fact that upon the adjudication in this case the status of the shareholders *changed* to that of creditors,—they ceased being shareholders—so that the proceeding assumed, as in other cases, the nature of a liquidation between a bankrupt, through its officers and attorneys, on the one side, and its creditors (the shareholders), on the other side. Petitioners concede (Petitioners' brief, pp. 13 and 14), that the shareholders have become creditors by reason of the adjudication in bankruptcy. Furthermore the bankruptcy courts are not concerned with the status of the parties before adjudication: they deal with the status after adjudication, which is always bankrupt and creditors; and in the case at bar the officers and attorneys of the Continental Building and Loan Association are now the bankrupt, and the former shareholders are the creditors.

It must be borne in mind that in the liquidation in bankruptcy of an ordinary commercial corporation, the stockholders are not arrayed against the creditors. They do not have to account to the creditors. It is the officers and attorneys of the corporation that must do this accounting on behalf of the bankrupt. If there has been mismanagement, assets concealed, or property fraudulently transferred, or the like, it is the officers and attorneys of the bankrupt that are responsible and must account both civilly and criminally, and not the stockholders. So, we say, the Continental Building and

Loan Association having become bankrupt, it is its officers and attorneys upon whom the burden rests to account in the bankruptcy court for the management of the bankrupt's property, and it is to the shareholders that this accounting must be made, since they have assumed, by reason of the adjudication, the status of creditors, and have ceased to be shareholders.

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#### IV.

**THE RULE THAT OFFICERS AND ATTORNEYS OF THE BANKRUPT MUST NOT INTERFERE IN THE ELECTION OF A TRUSTEE, IS BASED UPON SUBSTANTIAL REASONS, WHICH APPLY IN THIS CASE AS WELL AS IN OTHER CASES.**

Petitioners say in their brief (Petitioners' Brief, p. 15):

"The courts have repeatedly drawn attention to the necessity of protecting the creditors against the bankrupt and have refused to approve elections accomplished in the interest of the bankrupt by the activities of its officers, directors, employees and stockholders."

That bankruptcy courts have uniformly refused to approve trustees chosen through the influence of bankrupts or their attorneys, appears from the following cases:

In re John F. McGill, 106 Fed. Rep. 57;  
5 Am. B. R. 155, 161;

In re Rekersdres, 108 Fed. Rep. 206; 5 Am.  
B. R. 811;

Falter v. Reinhard, 4 Am. B. R. 782;

In re Henschel, 109 Fed. Rep. 861; 6 Am. B. R. 305;

In re Dayville Woolen Co., 114 Fed. Rep. 674; 8 Am. B. R. 85;

In re Gordon Supply Manufacturing Co., 129 Fed. Rep. 622; 12 Am. B. R. 94;

In re Cooper, 135 Fed. Rep. 196; 14 Am. B. R. 320;

In re Hanson, 156 Fed. Rep. 717; 19 Am. B. R. 237;

In re Sitting, 182 Fed. Rep. 917; 25 Am. B. R. 685;

In re Van De Mark, 175 Fed. Rep. 287; 23 Am. B. R. 760;

In re Wink, 206 Fed. Rep. 348; 30 Am. B. R. 298;

In re Morris, 154 Fed. Rep. 211; 18 Am. B. R. 828;

In re Ployd, 183 Fed. 791; 25 Am. B. R. 196.

Petitioners claim, however, that this rule does not apply to the case at bar, where the creditors are all shareholders and are creditors solely by reason of being shareholders. As we pointed out above (page 7), the shareholders changed into creditors upon the adjudication and are no longer to be treated as shareholders for any of the purposes of the bankruptcy proceeding. Petitioners in their brief concede that the shareholders have become creditors (Petitioners' brief, p. 14). All that is left of the bankrupt corporation, therefore, are its officers and attorneys, and it is they who must ac-

count, on behalf of the bankrupt, to the bankruptcy court and to the trustee selected by the shareholder creditors.

Petitioners, in attempting to avoid the application of the rule to the case at bar, ignore the *reason* for the rule, which is the real test to be applied. If the reason for the rule is as applicable to the case at bar as to other cases, then the rule should be applied, even though the case at bar is an unusual one and arose under peculiar circumstances. It is a familiar maxim of jurisprudence that when the reason of a rule ceases, so should the rule itself, but where the reason is the same, the rule should be the same (Civil Code Cal., Secs. 3510, 3511).

What then is the basic reason of the rule? Upon bankruptcy the bankrupt must account to his trustee for his management of his property, for concealed assets, if any, for property fraudulently transferred, if any, for preferences given, if any, and the like.

In the case of *In re Hanson*, 156 Fed. Rep. 717, 718; 19 Am. B. R. 237, the court said:

“It is well settled by all the authorities that the trustee represents the creditors, and not the bankrupt, in the administration of the estate; and that it is improper that the bankrupt shall actively interfere with the matter of his selection and appointment; and that, if he does interfere and the person aided by him is appointed by votes procured by such interference, the appointment should for that reason be disapproved. \* \* \* The rule is a salutary one, and based on obviously sound reasons. It often happens that it becomes the duty of the

trustee to actively antagonize the bankrupt by efforts to discover secreted assets, or to set aside conveyances as fraudulent, or to recover preferences. There should be no color or basis for suspicion of any partiality or sense of obligation on the part of the trustee toward the bankrupt. Hence, however high the character of a proposed trustee may be, the active interference of the bankrupt in favor of his appointment will render him practically ineligible to appointment as trustee in bankruptcy."

As was said by Judge Dooling in *In re Forestier*, 222 Fed., pp. 537, 538; 35 Am. B. R. 51, 52:

"It is not important, in a particular case, to determine that the interests of the bankrupt and the trustee will necessarily conflict. The important question is *may* they conflict."

In the case of *In re Rekersdres*, 108 Fed. Rep. 206; 5 Am. B. R. 811, the court said:

"The trustee should be the free and unbiased choice of the creditors and not be influenced by any other interest. *Falter v. Reinhard*, 4 Am. B. R. 782; *in re McGill*, 5 Am. B. R. 155, 106 Fed. 57. \* \* \*. A trustee should be wholly free from all entangling alliances or associations that might in any way control his complete independence and responsibility."

As we have seen, it is the officers and attorneys of the bankrupt that must do this accounting in the case at bar. Furthermore, these officers and attorneys, for more than three years prior to bankruptcy, conducted a partial liquidation of the affairs of the corporation involving the distribution of over \$500,000.00 to shareholders, and during this time no new business was transacted (Trans. p. 46). This liqui-

dation must all be accounted for to the bankruptcy court, and to the trustee in bankruptcy. *Would it not make the administration of the bankruptcy act a vain and impotent thing, and merely a pro forma proceeding, if the officers and attorneys of the Continental Building and Loan Association could select directly or indirectly the trustee to whom they are to make this accounting? Are they to be permitted to investigate, as trustee, or through a trustee selected by them, their own account?*

It has been the uniform practice of courts having to do with the liquidation of estates not to allow a person to occupy a dual position, in which he must account to himself (Williams on Bankruptcy, 9th ed., p. 85). Yet this is exactly what petitioners are seeking to accomplish here, indirectly, it is true, but with the same consequences as if directly. The law would be a sham if it permitted to be done indirectly what it forbade to be done directly. In the unreported case of *In re Charles Schulz* (D. C. Northern Dist. of Cal., decided May 21, 1915), where the bankrupt made an assignment for the benefit of creditors prior to bankruptcy, and the assignee and his attorney attempted to control the election of the trustee in bankruptcy, Judge Dooling said:

“It is the policy of this court that a trustee in bankruptcy shall be absolutely free in fact and in law to require a settlement from an assignee of the bankrupt and to secure such absolute freedom it will not permit the selection of a trustee by or through the assignee of his attorney.”

Does not the rule enunciated by Judge Dooling apply with redoubled force to the case at bar, where the officers and attorneys of the Continental Building and Loan Association occupy a position similar to that of the assignee and his attorney in the Schulz case?

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## V.

**THE MAJORITY CREDITORS HAVE NOT BEEN DEPRIVED OF THE RIGHT TO SELECT A TRUSTEE, BUT MUST NOT, AS AGAINST THE OBJECTING MINORITY, SELECT A TRUSTEE CONNECTED WITH THE FORMER MANAGEMENT OF THE BANKRUPT, EITHER DIRECTLY OR INDIRECTLY.**

Petitioners seem to take the position in their brief that the majority creditors have been deprived of their *unquestioned* right to select the trustee. This is answered by the referee, who says, in his certificate (Trans. p. 35):

“I would be pleased to have the creditors herein select as trustee a financial institution of equal standing with the Anglo-California Trust Company, but because of its relations with the bankrupt, and the association with it of attorney of the bankrupt, it is my opinion that it should not be the trustee herein.

The stockholders first represented by Mr. McCullough, then by Mr. Leonard have the power, in number and amount, to name the trustee. They have not been deprived of the right of exercising that power, but I hold that they must choose a disinterested person, and that the choice shall be their choice and not that of the officers or attorneys connected with the former management of the bankrupt.”

The minority have the right to be heard, however, and, under the circumstances of this case, where it appears undisputed that the Anglo-California Trust Company was selected through the active efforts of the officers and attorneys of the bankrupt, and that Gavin McNab, chief counsel of the bankrupt, is a director of the trust company and one of its legal advisers, and that the trust company is trustee under all the deeds of trust securing the bankrupt's loans, the majority cannot force this choice on the objecting minority, because it comes too near to a continuation of previous conditions to be warranted.

In the case of *In re Gordon Supply & Manufacturing Co.*, 129 Fed. Rep. 622; 12 Am. B. R. 94, the court said:

“There can be no objection personally to the trustee who has been chosen by a majority of those interested in the estate, at the creditors' meeting; and the right to such majority under ordinary circumstances to control the matter must be conceded. The trustee is the representative of creditors and they are the ones to decide who he shall be, subject only to the right of the court to supervise the choice where it is objected to. In the present instance the trustee chosen is not only a stockholder in the bankrupt corporation against which the proceedings were instituted, but he has been admittedly associated closely as attorney and legal adviser with those who have been hitherto in control, and their management is not only the subject of criticism, but may call for action on the part of the trustee to hold them personally responsible. To approve of the trustee now selected comes too

near, therefore, to a continuation of previous conditions to be warranted. With so many others who would be fully as efficient and entirely acceptable, the majority have no right to impose their present choice on the objecting minority."

The effect of Referee Kreft's ruling, therefore, is simply that the majority creditors must pick a disinterested trustee, one not elected through the influence of, or in any way connected with, the former management of the bankrupt.

Woodman in his "Law of Trustees in Bankruptcy" (Chapter 1, Sec. 11) says: "It is well settled that the trustee should be free from all entangling alliances" and cites many cases in support of this doctrine.

Petitioners further claim that the referee's ruling prevents shareholders favorable to the conduct of the liquidation by the officers and attorneys of the bankrupt, and especially Mr. Wallace Bradford, from voting. This is not so. What the referee does say is that such shareholders, while they may suggest whom they please for trustee, and may vote for whom they please for trustee, are not the proper persons to organize and lead the creditors for the purpose of choosing the trustee. They have the right to vote at all times, and they have not been, and will not be deprived of that right.

## VI.

**EVEN IF THE ELECTION HAD NOT BEEN DIRECTED, MANAGED OR CONTROLLED BY THE OFFICERS OF THE BANKRUPT, THE ANGLO-CALIFORNIA TRUST COMPANY WAS DISQUALIFIED BECAUSE IT IS THE TRUSTEE UNDER ALL THE DEEDS OF TRUST SECURING THE BANKRUPT'S LOANS.**

One of the objections raised at the first meeting of creditors on September 15, 1915, to the approval of the election of the Anglo-California Trust Company, was that it was trustee upon the deeds of trust which secured the bankrupt's loans (Trans. pp. 23, 24). It has been a common rule of all courts, having to do with the liquidation of estates, not to permit a person to occupy a dual position where he must account to himself (Williams on Bankruptcy, 9th Ed., p. 85). This is the basis of the rule that the bankrupt cannot select his trustee. It has been applied even to assignees and receivers who seek to be trustees (In re Clay, 192 Fed. Rep. 830, 833; 27 Am. B. R. 715, 719).

What is not allowed to be done directly, cannot, of course, be allowed to be done indirectly, and so bankrupts and assignees are not allowed even to influence the selection of trustees. They must hold hands off (In re Forestier (D. C. Cal.), 222 Fed. Rep. 537, 538; 35 Am. B. R. 51, 52; in re Schulz (D. C. Northern Dist. Cal.), decided May 21, 1915).

In the case at bar, the Anglo-California Trust Company, if its election as trustee in bankruptcy stands, would be in the anomalous position of accounting *for itself*, as trustee under these deeds of

trust, *to itself*, as trustee in bankruptcy. For this reason, alone, the election of the Anglo-California Trust Company was properly disapproved by the referee.

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## VII.

**TO DISQUALIFY A CANDIDATE FOR TRUSTEE IT IS NOT NECESSARY TO SHOW THAT THE ACTIVITY OF THE BANKRUPT ACTUALLY INFLUENCED THE CREDITORS—THE ACTIVITY OF THE BANKRUPT IS SUFFICIENT.**

Petitioners in their brief (Petitioners' Brief, p. 22) state that a mere attempt to influence an election is not sufficient unless it has actually had that result, and that there is not one word of evidence to show that any of the creditors who voted for the majority candidate was actually influenced by any of the acts of the bankrupt's directors and attorneys. Petitioners cite in support of this statement the case of *In re Eastlack* (D. C., N. J.) 16 Am. B. R. 536, 145 Fed. 168.

This proposition is refuted by Remington, in his work on bankruptcy, when he says:

“The election of a trustee in the bankrupt's own interest should be disapproved. It is the policy of the bankruptcy law to take the management of bankrupt estates out of the hands of the bankrupts themselves. The bankrupt has no right to influence the choice of a trustee and he has no voice in the election. Accordingly interference by the bankrupt, the voting of claims in his interest or at his direction, should be discountenanced and held to invalidate the choice of a trustee thus secured \* \* \*.

And it has been held, apparently, that some showing of actual influence must be made, and that only such votes as were so proved to have influenced should be rejected and that the mere existence of such relation is not of itself a disqualification (quoting from *In re Eastlack* (D. C., N. J.) 16 Am. B. R. 536, 145 Fed. 68; *In re Lloyd* (D. C., Wis.) 17 Am. B. R. 98; and in *re Kaufman* (D. C., Ky.) 24 Am. B. R. 117, 179 Fed. 552).

*But if the cases in re Eastlack, in re Kaufman and In re Lloyd are to be interpreted as to laying down the rule, they are not to be approved. Such proof would be almost impossible to produce, and the clever and more dangerous the collusion the more difficult would it be to disqualify the particular voter or candidates who have colluded."*

Remington on Bankruptcy, 2nd Ed., Vol. 1,  
Sec. 887.

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## VIII.

**DIRECTORS, OFFICERS AND STOCKHOLDERS OF ORDINARY CORPORATIONS CANNOT EVEN VOTE THEIR INDIVIDUAL CLAIMS FOR TRUSTEE WHERE THERE HAS BEEN COLLUSION OR IMPROPER INFLUENCE.**

Petitioners in their brief state (Petitioners' Brief, p. 21):

"Yet even in an ordinary bankruptcy, where the bankrupt and the creditors are not identical and an election in the interest of the bankrupt is not an obvious impossibility, directors, officers and stockholders who are bona fide creditors may take part in the election of trustee and may suggest the trustee."

This proposition is refuted by Remington, in his work on bankruptcy, when he says:

“In one case it was held not improper to elect a director of a bankrupt corporation as one of three trustees (in re Syracuse Paper and Pulp Co., 21 Am. B. R. 174, 164 Fed. 275, (D. C., N. Y.)). But the decision in the case in re Syracuse Paper and Pulp Co., was undoubtedly based on the fact that there were three trustees elected two of whom in no way occupying inconsistent positions, the third trustee being chosen merely as a convenience because of his familiarity with the details of the bankrupt’s business. To extend the doctrine enunciated in that case to cases where only one trustee is elected would be subversive of proper administration and be a shock to the moral sense as well, for that ‘one cannot serve two masters’ is both sound sense and good law \* \* \*.

Yet directors, stockholders and employees of bankrupt corporations are entitled to vote, *and the evil of permitting the action of a majority in number of creditors to be controlled by the vote of an officer or stockholder having a large claim can be sufficiently guarded against by the discretion vested in the referee to refuse a vote to such claimant in cases of collusion or improper influence.* In re Stradley & Co. (D. C., Ala.) 26 Am. B. R. 149; 187 Fed. 285.”

Remington on Bankruptcy, 2nd Ed., Vol. 1, Sec. 887.

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## IX.

**PETITIONERS DO NOT SHOW THAT THEY WERE IN ANYWISE  
PREJUDICED BY THE ORDER OF WHICH THEY COMPLAIN.**

There is nothing in the record to show that peti-

tioners, or any of them, were prejudiced by the orders of the referee and the district judge. For aught that appears in the record they may have voted for Williams, or the Union Trust Company, the opposing candidates for trustee. There is nothing in the record to show that they voted for the Anglo-California Trust Company, whose election was disapproved, and of which disapproval they complain.

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## X.

### THE REFEREE'S RULING WAS NOT MADE FOR THE BENEFIT OF ANYONE OTHER THAN THE STOCKHOLDERS THEM- SELVES.

Petitioners in their brief (Petitioners' Brief, p. 23) use up a lot of space in attempting to show that the referee's ruling was made to help out the State Building & Loan Commissioner. This violent assumption is absolutely false and has not the shadow of support in fact or in anything appearing in the record. The State Building & Loan Commissioner was not a candidate for trustee and had nothing to do with the election. Furthermore, Mr. W. R. Williams entered the campaign for trustee not as State Superintendent of Banks, but as an individual. The State Superintendent of Banks and the State Building and Loan Commissioner have no official standing before the bankruptcy court and no one contends that they do.

## CONCLUSION.

For the foregoing reasons, we respectfully submit that the order under review should be affirmed.

Dated, San Francisco,

March 21, 1916.

HELLER, POWERS & EHRLMAN,

HUGO D. NEWHOUSE,

REUBEN G. HUNT,

*Attorneys for Respondents.*



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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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MRS. GLENN D. HART and  
GLENN D. HART,

*Appellants,*

vs.

WALTER ADAIR, J. T. EPPERLY, JAMES  
P. BURNS, F. S. GREEN and L. B. WAL-  
LACE,

*Appellees.*

and

W. C. HARDING LAND COMPANY, a cor-  
poration,

*Appellant,*

vs.

MRS. GLENN D. HART and  
GLENN D. HART,

*Appellees.*

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**Transcript of Record on Appeal**

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On Appeal from the District Court of the United  
States for the District of Oregon.

Filed

NOV 24 1915



No. \_\_\_\_\_

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IN THE  
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MRS. GLENN D. HART and  
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GLENN D. HART,

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**Transcript of Record on Appeal**

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On Appeal from the District Court of the United  
States for the District of Oregon.



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State of Oregon,  
County of Douglas,—ss.

Due service of the within Citation is hereby accepted in Douglas County, Oregon, this 23rd day of April, 1915, by receiving a copy thereof, duly certified to as such by E. A. Lundburg, Attorney for Plaintiffs.

B. L. EDDY,  
Attorney for Walter Adair,  
J. T. Epperly, James P.  
Burns, F. S. Green and  
L. B. Wallace,  
Defendants.

Filed April 24, 1915.      G. H. Marsh, Clerk.

RECORD ON APPEAL—AGREED STATE-  
MENT (UNDER EQUITY RULE 77)

*In the District Court of the United States for the Dis-  
trict of Oregon.*

MARCH TERM, 1914.

BE IT REMEMBERED, That on the 9th day of March, 1914, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint (agreed statement thereof), in words and figures as follows, to-wit:

BILL IN EQUITY, NO. 6341.

MRS. GLENN D. HART AND GLENN D.  
HART,

Plaintiffs,

vs.

W. C. HARDING LAND COMPANY, a corpora-  
tion, WALTER ADAIR, J. T. EPPERLY,  
JAMES P. BURNS, F. S. GREEN and L. B.  
WALLACE,

Defendants.

To the Honorable Charles E. Wolverton and Robert  
S. Bean, Judges for the District Court of the  
United States, for the District of Oregon;

Mrs. Glenn D. Hart, wife of Glenn D. Hart, citi-  
zens of the State of South Dakota, residing in Law-  
rence County in said State, brings this, her bill, against  
the Harding Land Company, a corporation, duly organ-  
ized and existing under the laws of the State of Ore-  
gon, and having its principal place of business at Rose-  
burg in said State, and a citizen and inhabitant of the  
Oregon District in same State, and Walter Adair, J. T.  
Epperly, James P. Burns, F. S. Green and L. B.  
Wallace, citizens of the State of Oregon, residing in  
Douglas County in said State.

And plaintiff complains and says:

I.

That the plaintiff, Mrs. Glenn D. Hart and Glenn  
D. Hart are now and have been during all times herein

mentioned wife and husband, and are citizens of the State of South Dakota, residing in Lawrence County, in said State; that the first cause of suit herein set out exists in favor of said plaintiff, Mrs. Glenn D. Hart; that the second cause of suit is by plaintiff as assignee, and that the assignor thereof, Glenn D. Hart, is a citizen of South Dakota residing in Lawrence County in said State; that the third cause of suit is by plaintiff as assignee and that the assignor thereof, Mrs. Ella Peterson, is a citizen of the State of Colorado, residing in Gilpin County in said State; that each of said persons so named as assignors were, and are now, competent to maintain a suit against defendants as if no such assignment had been made; that this is a suit in equity and that the aggregate amount in dispute herein exceeds the sum of Three Thousand (\$3000.00) Dollars exclusive of interest and costs, and that this cause is a controversy wholly between citizens of different states.

## II.

That on the 24th day of March, 1910, and for some time prior thereto, the defendants, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, were, and had been, the owners in fee simple of that parcel of real property, situated in the County of Douglas, State of Oregon, platted and known as "Plat 'D' Roseburg Home Orchard Tracts."

That said owners of said property under and by virtue of a certain agreement by and between said owners and the W. C. Harding Land Company, a cor-

poration, organized and existing under the laws of the State of oregon, granted a certain beneficial interest and equity in said tract of land to said corporation, for the purposes of exploitation and sale of the same by tracts and parcels according to terms and conditions in said agreement set out and contained; that by the terms of said agreement said W. C. Harding Land Company was duly authorized to solicit purchasers and make sales thereof under the name of the W. C. Harding Land Company, and the proper officers of the same were to sign the contracts, but deeds thereof to be given by said owners by their trustee.

That as a consideration for said services rendered and to be rendered by said corporation thereunder, said beneficial interest and equity in said land, platted and known as Plat "D" Roseburg Home Orchards Tracts, Douglas County, Oregon, was granted by said owners and consisted of a certain per cent based upon an agreed minimum price of \$200.00 per acre; that in additon thereto said W. C. Harding Land Company were privileged and permitted to enter into contracts on its account and to its further benefit for the planting, cultivating and caring for orchards on said tracts with possible investors making same a part of any or all contracts of sale therefore.

That said arrangement and agreement between the defendants herein, the said owners, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace and the W. C. Harding Land Company, was in writing, and a copy thereof marked exhibit "A" is herewith attached and made a part of this complaint.

## III.

That on or about the 24th day of March, 1910, at Deadwood, South Dakota, the plaintiff agreed to purchase of the defendants and the defendants agreed to sell and convey unto the plaintiff for the agreed price of Thirty Five Hundred (\$3500.00) Dollars, plaintiff paying at that time in cash, the first payment of said purchase price in the sum of Seven Hundred (\$700.00) Dollars and to pay the balance of said purchase price in installments of Seven Hundred (\$700.00) Dollars each on or before the 24th day of March of each and every year thereafter, together with six per cent (6%) per annum on deferred payments the following described property situated in the County of Douglas and State of Oregon, to-wit:

Lot Eighteen (18) of plat "D" of Roseburg Home Orchard Tracts of said County and State, as shown and designated on the duly recorded plat thereof on file in the office of the County Clerk of said Douglas County, Oregon.

The said agreement was in writing and a copy of the same is attached hereto marked Exhibit "B" and made a part of this complaint.

## IV.

That on and about the 21st day of March, 1910, and prior to the making of said agreement, the defendants, by and through their representatives, agents and sales manager, T. W. Kendall, at Deadwood, South Dakota,

for the purpose of inducing plaintiff to purchase said Lot 18 and Plat "D" and to make said first payment thereon of Seven Hundred (\$700.00) Dollars, falsely and fraudulently stated and represented to plaintiff that said tract of land, comprising 10 acres and designated as Lot 18 plat "D" was worth the sum of \$3500.00; that the three tracts then remaining unsold including said Lot 18, namely lots 17, 18 and 19 of said Plat "D," were the choicest tracts of the entire plat; that the W. C. Harding Land Company had caused the soil of said lot with the rest of Plat "D" to be examined by an expert orchardist and caused the quality and character of the soil to be examined and reported upon by such expert, and that such examination and report showed soil particularly adapted to the growing of apples, and peaches, and that this tract had the best soil of that section of the Umpqua valley for such purpose and as good as the "volcanic ash" soil of the Wenatchee district of Washington; that the soil of said tract was a rich, deep loam and easily cultivated; that the tract was a sort of upland and had perfect drainage and would not need irrigation; that said agent exhibited certain panoramic views and blue prints of the Umpqua Valley and gave to this purchaser various illustrated and printed booklets, plats and maps, descriptive thereof, and published by said W. C. Harding Land Company representing that the statements set out and contained therein were true and applied with equal force to said tract of Plat "D"; that said Plat "D" was the choicest apple land of all the various plats and subdivisions theretofore handled and sold by his company,

the W. C. Harding Land Company, in that section of Oregon; that the W. C. Harding Land Company was thoroughly reliable and trustworthy and would not place on the market or offer for sale any parcel of land not suitable for the purposes represented; that it was not necessary to make a trip to Oregon to look over and examine said lot of Plat "D" but that it was entirely safe to buy it relying solely upon the statements of his company, and those made by him as agent without seeing said tract; that this purchaser could rely and depend upon said agent's representations so made regarding said lot of Plat "D" and to take his word for the quality and character of the soil and its adaptability for orchard purposes, as the same were true.

## V.

That the representations and statements made by said defendants and their representatives, agents and sales manager, T. W. Kendall, as set out and alleged hereinbefore, were false and fraudulent, as hereinafter more particularly alleged and set forth; were so known to be false by defendants herein and were made with intent to deceive and defraud this plaintiff by inducing her to enter into said contract of purchase; that the plaintiff believing them to be true and relying and acting on said representations and statements so made, and reposing a special trust and confidence in the said agent and representatives making the same, entered into said contract of purchase of Lot 18 of Plat "D" aforesaid and paid thereon said cash payment of Seven Hundred (\$700.00) Dollars; that the plaintiff would

not have entered into said contract of purchase or made said payment thereon, had she known said representations and statements to be false.

## VI.

That in addition to the said sum of Seven Hundred (\$700.00) Dollars by plaintiff paid to defendants as aforesaid on the purchase price of said lot and tract, plaintiff, by the terms of said contract has made further payments thereon as follows: June 2nd, 1911, Three Hundred Fifty (\$350.00) Dollars; April 16th, 1912, Four Hundred (\$400.00) Dollars; that on or about April 3rd, 1911, paid taxes assessed against said lot 18, for the year 1910, in the amount of Eight and 75/100 (\$8.75) Dollars and on or about April 3rd, 1912, paid taxes assessed thereon for the year 1911, in the amount of Eight and 75/100 (\$8.75) Dollars.

## VII.

That the said representations and statements hereinbefore set forth were false in the following particulars: That said lot 18 of Plat "D" is not worth to exceed fifty (\$50.00) Dollars per acre and its use and value exists only for ordinary farm purposes when drained by tiling; that it lies very low, is bottom land and in a swale; that during high water in the rainy season, the nearby creek overflows and sweeps over parts of the lot; that the water stands on it during the winter months and does not drain away; that the surface soil is of a stiff, black, sticky nature, while the sub-soil is a sort of

joint clay, very tough and of the nature of "hard pan" through which water does not soak or drain; that the said soil is not adapted for orchard purposes and is entirely unfit for the growing or production of apples or peaches; that during the summer or dry season, said soil dries out, bakes and becomes very hard and cracks; that when plowed, it turns up in great chunks or clods and is almost impossible of cultivation; that its particular qualities, character and location, make it utterly worthless for orchard purposes, and to the growing and culture of apple or peach trees and to maintain the same.

### VIII.

For the purpose of further persuading and inducing plaintiff to purchase said lot 18 of Plat "D" aforesaid and to make such cash payment of Seven Hundred (\$700.00) Dollars and other and subsequent payments thereon, the defendants, by its agents and officers and representatives, falsely stated and misrepresented to the plaintiff that if plaintiff would enter into said agreement and purchase lot 18 of Plat "D" and make said payments therefor, that they would plant said tract to Spitzenbergs and Newtown Pippin Apple Trees with peach tree fills not less than forty six to the acre, and give thorough cultivation and care to same in every detail necessary to the proper growing of said trees for the period of three years, and during said time to replace any trees that should, from any cause, die or become injured, and that they would deliver to this plaintiff, a full set, thoroughly cultivated planting as aforesaid, all of which statements and representations

and promises were false and fraudulent, which said defendants knew were false and fraudulent, which said defendants knew were false when made, but which were thus made to mislead and deceive plaintiff; that plaintiff relied upon the same as true and acted thereon to her damage as hereinafter set out.

## IX.

That thereafter, to-wit: On or about the . . . . . day of July, 1913, the plaintiff made a journey to Oregon and to said Douglas County, and for the first time discovered and learned that the said representations regarding said lot 18 of Plat "D" were false and untrue, and thereupon notified defendants that further payments would not be made on said contract on account of said fraud, and immediately sought restitution, by demanding of the defendants, the return of said purchase money and all payments made on said contract and because of it, and thereupon tendered back to defendants said contract of purchase, and offered to surrender up and cancel the same, and that plaintiff was then, and ever since has been, and now is, ready, willing and able to do that which in equity and good conscience she should do in reference to said agreement and the said lot and elected to rescind and cancel the said agreement with defendants and to quitclaim and reconvey by sufficient deed or otherwise, any and all title and estate in said lot by said plaintiff to defendants; but that defendants have failed to make amends or restitution in respect to said purchase and sale; although plaintiff has allowed a reasonable time to elapse in which

defendants could do so, with the assurance and on the understanding that something would be done by defendants to this end; that plaintiff has sustained damage by said acts of the defendants in the respective sums of Seven Hundred (\$700.00) Dollars; Three Hundred Fifty (\$350.00) Dollars; Four Hundred (\$400.00) Dollars; Eight  $74/100$  (\$8.74) Dollars; Eight  $74/100$  (\$8.74) Dollars, to-wit: the total sum of One Thousand Four Hundred Sixty Seven  $48/100$  (\$1467.48) Dollars, with interest at the rate of six per cent per annum from dates of payment thereof.

For a further and second cause of suit Plaintiff alleges:

The Bill of Complaint then sets forth a second and similar cause of suit for the rescission for like reasons of a like contract made between said W. C. Harding Land Company and one Glenn D. Hart, husband of plaintiff, with respect to the sale of Lot 19 of said Plat "D" at the price of \$3500.00, of which said Glenn D. Hart paid to said W. C. Harding Land Company the following amounts, to-wit: \$700.00 March 24, 1910; \$700.00 June 2, 1911; \$8.75 April 3, 1911; and \$8.75 April 3, 1912; and it is alleged that under date of April 23, 1912, said Glenn D. Hart for a valuable consideration assigned to plaintiff all his right, title and interest, claim or demand in and to said contract, which assignment was duly approved by said W. C. Harding Company and by B. L. Eddy, Trustee.

For a further and third cause of suit:

The Bill of Complaint then sets forth a third cause of suit for the rescission for like reasons of a like contract made between W. C. Harding Land Company and one Ella Peterson, a citizen of the State of Colorado, with respect to the sale of Lot 17 of said Plat "D" at the price of \$3500.00, of which said Ella Peterson paid said W. C. Harding Land Company the following amounts, to-wit: \$100.00 April 15, 1910; \$300.00 May 15, 1910; \$400.00 November 1, 1910; \$25.00 December 1, 1910; and \$25.00 on the first day of each and every month thereafter to and including the 1st day of April, 1913, and \$8.75 on April 3, 1913, and \$50.00 on May 1, 1913; and it is alleged that prior to the institution of this suit said Ella Peterson, for a valuable consideration, assigned to plaintiff all her right, title and interest, claim or right of action in and to said contract.

WHEREFORE plaintiff prays the decree of the Court:

FIRST: That the agreements of purchase and sale as set out and referred to in the complaint be, in each case rescinded, cancelled and declared to be null and void.

SECOND: That the sum of Four Thousand Four Hundred Sixty Eight  $45/100$  (\$4468.45) Dollars advanced and paid on said contract, as hereinbefore set forth, be declared to be due and owing from the said defendants and each of them to plaintiff herein.

THIRD: That interest at the rate of six per cent (6%) per annum on the said sum of Four Thousand Four Hundred Sixty Eight  $45/100$  (\$4468.45) Dollars from the respective day and dates upon which payments and installments making up said aggregate, as hereinbefore set forth, were made to defendants, be declared to be due and owing from said defendants and each of them to plaintiff herein.

FOURTH: That plaintiff have judgment against defendants for the amount so found due, and for such other general relief as may to the Court be deemed just and equitable, and for costs and disbursements herein incurred.

To the end that the plaintiff may obtain the relief prayed for herein, she further prays the Court to grant her process by subpoena directed to the W. C. Harding Land Company, a corporation, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, *defendants* herein named, commanding them to appear and answer, though not under oath, all of the allegations of the bill herein filed, and to stand to, perform and abide such further order, direction and decree as may be made against them.

E. A. LUNDBERG,  
E. R. LUNDBERG,  
Attorneys for Plaintiff.

AND AFTERWARDS, to-wit, on the 8th day of April, 1914, there was duly FILED in said Court and Cause, an answer (agreed statement thereof) in words and figures as follows, to-wit:

Come now the Defendants Walter Adair, J. T. Epperly, James P. Burns, F. S. Green, and L. B. Wallace, and answering for themselves alone, make answer to the bill of complaint herein as follows, to-wit:

I.

These defendants admit that the plaintiffs are wife and husband.

II.

Deny that these defendants, as owner of the property referred to under paragraph II of the first alleged cause of suit, set forth in said bill of complaint, granted a certain or any beneficial interest or equity in said tract of land to said W. C. Harding Land Company, for the purpose of exploitation or sale or for any purpose, except as hereinafter alleged; deny that as a consideration for said services rendered and to be rendered by said corporation, thereunder or otherwise, any beneficial interest or equity in said land was granted by said owners or any of them, or consisted of a certain or any per cent based upon an agreed minimum or other price of two hundred dollars (\$200) per acre or any price per acre; deny that said W. C. Harding Land Company was privileged or permitted to enter into contracts on its account or to its further benefit for the

planting, cultivating or caring for orchards on said tracts with possible or any investors making the same part of any contract of sale therefor, except as hereinafter stated.

### III.

Deny that on or about the 24th day of March, 1910, or at any time, at Deadwood, South Dakota, or elsewhere, the plaintiff agreed to purchase of these defendants, or any of them, or that these defendants or any of them agreed to sell or convey unto the plaintiff for any price whatever Lot 18 of Plat "D" of Roseburg Home Orchard Tracts, or any property whatever.

### IV.

Deny that T. W. Kendall mentioned in paragraph IV of the first alleged cause of suit set forth in said bill of complaint ever was at any time or place the agent of these defendants or any of them and these defendants aver that these defendants and each of them are without knowledge as to whether or not on or about the 21st day of March, 1910, or at any time, the said T. W. Kendall at Deadwood, South Dakota, or elsewhere, for any purpose, falsely or fraudulently or otherwise stated or represented to plaintiff that said tract of land, comprising ten acres and designated as Lot 18 Plat "D" was worth the sum of thirty five hundred dollars (\$3500) or any sum whatsoever; or that the three tracts then remaining unsold, including the said lot 18 or any lots or tracts then remaining unsold, including the said lot 18 or any lots or tracts were the choicest tracts of the

entire plat; or as to whether or not the W. C. Harding Land Company had caused the soil of said lot with the rest or any of Plat "D" to be examined by an expert or any orchardist, or caused the quality or character of the soil to be examined or reported upon by such expert; or that such examination or report showed soil particularly or otherwise adapted to the growing of apples or peaches, or that this tract had the best or other kind of soil of that section of the Umpqua Valley for such or any purpose, or as good as "volcanic ash" or any soil of the Wenatchee District of Washington, or that the soil of said tract was a rich or deep loam, or easily cultivated, or that the said tract was a sort of upland, or had perfect drainage or would not need irrigation; or that said agent exhibited certain panoramic or other views or blue prints of the Umpqua Valley or gave to such alleged purchaser various or any illustrated or printed booklets, plats or maps, descriptive thereof or otherwise, or published by the said W. C. Harding Land Company, representing that the statements set out or contained therein were true or applied with equal or any force to said tract of Plat "D"; or that said Plat "D" was the choicest apple or other land of all or any of the various Plats or subdivisions theretofore handled or sold by the said W. C. Harding Land Company in that section of Oregon or elsewhere; or that the W. C. Harding Land Company was thoroughly or at all reliable or trustworthy or would not place on the market or offer for sale any parcel of land not suitable for the purposes represented; or that it was not necessary to make a trip to Oregon to look over or ex-

amine said lot of Plat "D," or that it was entirely or at all safe to buy it relying solely or otherwise upon the statements of his company, or those made by him as agent without seeing said tract or otherwise; or that said purchaser could rely or depend on said agent's representations so alleged to have been made regarding said lot of Plat "D" or take his word for the quality or character of the soil or its adaptability for orchard purposes, or that the same were true.

## V.

These defendants deny that they or any of them ever at any time or place made any of the representations or statements referred to in paragraph V of the first alleged cause of suit set out in said bill of complaint and aver that they and each of them are without knowledge as to whether or not any of said alleged representations or statements were made by the said T. W. Kendall, or by any agent or sales manager or other person whomsoever, and deny that said T. W. Kendall ever was at any time or place the agent or representative of those defendant or any of them; and these defendants aver that they, and each of them are without knowledge as to whether or not any alleged representations or statements referred to in said paragraph V were known to be false by any person whatsoever or were made with intent to deceive or defraud this plaintiff, by inducing her to enter into such alleged contract of purchase, or made with intent to deceive the plaintiff at all; and these defendants aver that they and each of them are without any knowledge as to whether or not the plain-

tiff believed the said alleged statements and representations to be true or relying or acting on said alleged representations or statements, or reposing special or any trust or confidence in said alleged agent or representatives making same, entered into said alleged contract of purchase of Lot 18 of Plat "D" aforesaid or paid thereon said cash payment of seven hundred dollars (\$700) or as to whether or not plaintiff would not have entered into said contract of purchase or made said payment thereon had she known said representations or statements to be false.

## VI.

Admits that the plaintiff has paid to the said W. C. Harding Land Company on account of the purchase of lot 18 of Plat "D" of Roseburg Home Orchard Tracts, the sums set out in paragraph VI of the first alleged cause of suit in said bill of complaint, but denies that any greater sum than four hundred and twenty eight dollars 59/100 (\$428.59) thereof was ever paid to these defendants or any of them, which sum of \$428.59 these defendants received from said W. C. Harding Land Company as part of the purchase price of said lot, these defendants being owners of said lot.

## VII.

These defendants deny that said lot 18 of Plat "D" is not worth to exceed fifty dollars (\$50) per acre or that its use or value exists only for ordinary farm purposes when drained by tiling; or that it lies very low

or is bottom land, or in a swale, or that during high water in the rainy season or at any time the nearby creek or any creek overflows or sweeps over any part of the said lot or that the water stands on said lot during the winter months or at any time or does not drain away; deny that the subsoil of said lot is a sort of joint clay or very tough or tough at all, or of the nature of "hard pan," so that the water does not soak or drain through the said subsoil; deny that the said soil is not adapted for orchard purposes or is entirely or at all unfit for the growing or production of apples or peaches; or that during the summer or dry season said soil dries out or bakes or becomes very hard or cracks, unless cultivation thereof be neglected; deny that when said soil is plowed it turns up in great chunks or clods or is almost or at all impossible of cultivation; deny that the particular qualities, character or location of said lot make it utterly or at all worthless for orchard purposes or to the growing or culture of apple or peach trees or to maintain same.

### VIII.

Deny that for the purpose of further or at all persuading or inducing plaintiff to purchase said lot 18 of Plat "D" or to make said cash payment of \$700 or other or subsequent payments thereon, or for any purpose or at all these defendants or any of them by an agent or officer or representative or directly or indirectly in any manner falsely or at all stated or represented to the plaintiff that if plaintiff would enter into said agreement or purchase said lot 18 of Plat "D" or

make said payments therefor, that they or any of them would plant said tract to Spitzenberg or Newtown Pippin or other apple trees, with peach tree or other fills, or give thorough or any cultivation or care to same in every or any detail necessary to the proper or other growing of said trees for the period of three years or any period whatsoever, or during said or any time to replace any trees that should from any cause die or become injured, or that they or any of them would deliver to this plaintiff a full or any set or thoroughly or otherwise cultivated or any planting, and these defendants deny that said alleged statements or representations or promises were false or fraudulent or that these defendants or any of them at any time knew that the same or any part thereof were false, and deny that the same were made to mislead or deceive plaintiff, or that plaintiff relied upon same as true or acted thereon to her damage at all.

## IX.

These defendants aver that they and each of them are without knowledge as to whether or not on or about the . . . . . day of July, 1913, plaintiff made a journey to Oregon or to said Douglas County, and these defendants deny that at said time the plaintiff for the first time discovered or learned that the said alleged representations regarding said lot 18 of Plat "D" were false or untrue, and deny that plaintiff discovered said representations to be false or untrue at all, or that thereupon plaintiff notified these defendants or any of them that further payments would not be made on said contract

on account of said alleged fraud, or immediately or at all sought restitution by demanding of these defendants or any of them the return of said purchase money, or of any payments made on said alleged contract or because of it, or that plaintiff at any time tendered back to these defendants or any of them said contract of purchase or offered to surrender up or cancel the same, or that plaintiff was then or ever since has been or now is, ready or willing or able to do that which in equity or good conscience she should do in reference to said agreement or said lot or that plaintiff elected to rescind or cancel the said agreement, and deny that plaintiffs had any agreement with these defendants or any of them and deny that plaintiff elected or offered to quitclaim or re-convey by sufficient or any deed or otherwise any or all title or estate in said lot by said plaintiff to these defendants or any of them; deny that these defendants or any of them ever gave to plaintiff any assurance or had with plaintiff any understanding that anything whatever would be done by these defendants by way of any alleged amends or alleged restitution in respect to said purchase or sale; deny that plaintiff has sustained damage by any action of these defendants or any of them in any sum whatsoever.

And for answer to the further and second alleged cause of suit set forth in said bill of complaint the said defendants specifically deny the allegations set forth in the same, except the making of said contract of sale and the payments made thereon, the ownership of the land and some other formal matters.

And for answer to the further and third alleged cause of suit set forth in said bill of complaint the said defendants specifically deny the allegations of the same except the making of said contract of sale and the payments made thereon, the ownership of the land and some other formal matters.

And further answering said bill of complaint these defendants allege that at all times mentioned in said bill these defendants were and now are the owners of the real property described in said bill, namely: Lots numbered 17, 18, and 19 in Plat "D" of Roseburg Home Orchard Tracts in Douglas County, Oregon, as shown by the recorded Plat thereof, being portions of a larger tract of land owned by these defendants and platted by their trustee for sale; that the W. C. Harding Land Company is and was at all times herein mentioned a corporation, incorporated, organized and existing under the laws of the State of Oregon, having its principal office at Roseburg, in Douglas County, Oregon, and engaged in the business of buying lands, planting the same to fruit trees and then selling the same.

That on or about July 1st, 1909, the defendants, J. T. Epperly, James P. Burns, Walter Adair, F. S. Green, and one C. H. Carney, who afterwards disposed of his interest to the defendant, L. B. Wallace, were the owners of a certain tract of land situated in Douglas County, Oregon, a part of which was afterwards platted by the trustees of the defendants herein as Plat "D" of Roseburg Home Orchard Tracts referred to in the bill of complaint; that said owners being desirous of selling and disposing of said land, and the said defendant

W. C. Harding Land Company having represented to defendants that it could find purchasers for those portions of said lands which were suitable for orchard purposes, provided same were sub-divided into small tracts, the said owners on the one part and the said W. C. Harding Land Company on the other part entered into a written agreement bearing date July 1st, 1909, by the terms of which the said W. C. Harding Land Company was to take charge of said lands and find purchasers therefor, during a period of one year from said date, according to the terms and conditions of said agreement, a copy of which agreement constitutes a part of Exhibit "A" attached to plaintiff's bill of complaint herein; that by a subsequent agreement made between these defendants and the said W. C. Harding Land Company bearing date September 10, 1910, a copy of which subsequent agreement is also embodied in said Exhibit "A," said agreement of July 1st, 1909, was modified, and by said agreements defendants were to have \$200.00 per acre for their said lands; that subsequent to said July 1st, 1909, said W. C. Harding Land Company caused such portions of said land as were suitable for orchard purposes to be surveyed and platted as said Plat "D" of Roseburg Home Orchard Tracts, and placed the same on the market in its own name as though it were owner thereof and entered into contracts with various persons for the sale of portions of said platted land, including the purchasers mentioned in the said bill of complaint; that in advertising said lands and in selling the same the said W. C. Harding Land Company never at any time held itself out as the agent

of these defendants or any of them, but at all times dealt with said lands as though it was the owner thereof; and the said W. C. Harding Land Company entered into written contracts with the respective purchasers of said land, including all of the purchasers mentioned in the bill of complaint herein, in its own name, none of these defendants as owners of said lands being in any way mentioned or referred to in said contracts or known in any way to any of said purchasers; that for the purpose of disposing of said lands the said W. C. Harding Land Company, upon its own account and for itself alone, undertook and agreed with the respective purchasers thereof, including the purchasers mentioned in the bill of complaint herein, that it would plant said lands to fruit trees of certain agreed varieties and cultivate and care for the trees on each lot for three years, and said W. C. Harding Land Company in making sales of said lots demanded and received, because of said planting and cultivation and in payment of its commissions and expenses, a price per acre over and above the \$200 per acre which these defendants as the owners of said lots were to receive; that it was at all times expressly understood and agreed by and between the W. C. Harding Land Company, and these defendants that these defendants should have no interest in any of said contracts for the planting or cultivation or care of fruit trees on said tracts, but all such contracts were to be made by said W. C. Harding Land Company on its own responsibility and none of these defendants were to be in any way responsible or liable for carrying out the same or to derive any benefit therefrom, or

incur any liability thereunder; and the said W. C. Harding Land Company made all such contracts for planting, cultivation and care in its own name and upon its own responsibility, and, as these defendants are informed and believe, and therefore allege, never claimed or represented that it was acting as agent for these defendants or any person or persons whomsoever; that all promises and agreements made to each and all of the purchasers mentioned in the bill of complaint herein with reference to planting, cultivation and care of said lands were made by said W. C. Harding Land Company in its own name and for itself alone and not as representative of these defendants or any of them or of any other person or persons; that each and all of the purchasers mentioned in the bill of complaint herein at all times well knew that under said contracts they were to look to the said W. C. Harding Land Company, and to it alone, for the performance of all of said contracts, and none of said purchasers ever at any time looked to these defendants or any of them to perform any undertaking in said contracts; that it was at all times contrary to the intention or expectation of these defendants, as the said W. C. Harding Land Company at all times well knew, that any such contracts for planting, cultivation or care of fruit trees should be embraced in contracts for the sale of said land, notwithstanding which said W. C. Harding Land Company included its agreements with purchasers with reference to planting, cultivation and care of fruit trees on said lands in the same agreements which covered the sale of the lands, the said W. C. Harding Land Company at all times

contracting and acting with reference to said lands toward all purchasers as though it were the absolute owner of said lands and the only person interested therein.

That none of these defendants ever at any time had anything to do with the sale of said lands; that all sales were negotiated by the said W. C. Harding Land Company and its agents and all representations, statements and promises with reference thereto which were made *were made* by said Company and its agents as coming solely from said W. C. Harding Land Company, and none of the purchasers mentioned in the bill of complaint herein were ever led to believe that said W. C. Harding Land Company was acting therein as agent for these defendants or any person or persons whomsoever.

That each of the said tracts of land referred to in the bill of complaint herein, is and was at all times a tract of fertile orchard land, well adapted to the successful growing of fruit trees, and at the time of entering into said contracts of sale with each of the purchasers mentioned in the bill of complaint herein, or as soon thereafter as practicable, the said W. C. Harding Land Company, as required by its contracts with said respective purchasers, planted said lands to Spitzenberg and Newtown Pippin apple trees, with peach tree fills as required by contract, and did thereafter for three years cultivate and care for each of said tracts as required by the terms of the contracts of said Company, with the respective purchasers, and at the expiration of said three years of cultivation and care there was on each of said tracts a thriving and growing young orchard

of Spitzenberg and Newtown Pippin apple trees; that the peach trees planted on said tracts as "fills" were intended to grow on said lands only temporarily, the intention being to remove same when the growth of the apple trees should require the whole of the soil, but it was found by experience that while the peach trees grew, they did not thrive so well on said soil as did the apple trees, and afterwards by agreement with the said respective purchasers named in the bill of complaint and long prior to July, 1913, the said W. C. Harding Land Company removed said peach trees from said tracts of land and with the express consent and agreement of said respective purchasers replaced said peach trees with pear trees which pear trees have ever since grown and flourishd upon said premises.

That each of said lots of land referred to in the bill of complaint is of rich and fertile soil and suitable for growing apple and pear trees; that after the close of the three years period of cultivation by the said W. C. Harding Land Company the said purchasers each neglected to properly cultivate or care for the said respective orchard tracts, but notwithstanding such neglect and want of care on the part of said purchasers and the plaintiff herein, the orchards on said lots of land are still living and growing and with proper care can readily be put into first-class condition as young orchards; that each of said lots is of a character of soil practically the same as various tracts of land in said county and in the same vicinity upon which fruit trees are being successfully cultivated and maintained at the present time; that practically all of the apple and pear

trees planted on said lots have grown and developed in a satisfactory manner except a small percentage of loss of trees not exceeding the percentage of loss ordinarily incurred in the development of a young orchard on the best of soil; that said land needed some drainage and the said W. C. Harding Land Company caused the same to be drained by ditching, in the manner in common use in said county; that the surface soil is a black soil slightly sticky in character but highly productive and capable of successful cultivation with ordinary care, and said surface soil extends to a depth of more than two feet, and no joint-clay or "hard pan" has been discovered underlying same; that the neglect of the said lots by the said purchasers after the said W. C. Harding Land Company had fully performed its contract for three years cultivation in each case, has been the sole cause of any unsatisfactory appearance of the soil of said lots.

That the price at which said W. C. Harding Land Company contracted to sell said lots to the purchasers named in the bill, namely \$350.00 per acre, including planting and three years' cultivation and care, was reasonable and not exorbitant; that said land alone was reasonably worth \$200.00 per acre; that since said sales were made the market value of fruit lands and orchards in said county has somewhat decreased, and the industry of fruit growing has suffered a backset, and the effort of the purchasers named in the bill to rescind said contracts and recover moneys alleged to have been paid is an inequitable attempt to avoid the natural though perhaps temporary loss which they appear to have suf-

ferred by the decline in land values and the stagnation of the fruit-growing business.

For a second and separate answer and defense to said bill of complaint and the whole thereof these defendants allege that they are informed and believe and therefore allege that long prior to July, 1913, each of the said purchasers mentioned in the said bill of complaint learned and fully knew of the exact location, quality and character of the soil of said respective lots of land and of the quality and kind of trees planted thereon by the said W. C. Harding Land Company and of the nature of the care and cultivation given to said lots by the said W. C. Harding Land Company and of the fact that peach trees had not grown so successfully upon said lots as all the parties interested had expected, and that each of said purchasers namely Mrs. Glenn D. Hart, Glenn D. Hart and Ella Peterson agreed with the said W. C. Harding Land Company that if said Company would take out said peach trees and replace the same with pear trees, which had been found by experience to grow more successfully than peach trees upon such soil, that each of them would accept the same as full satisfaction of any loss or damage suffered by the failure of peach trees to flourish in said soil; that in all other respects said purchasers were satisfied with the said lots and the orchards thereon and accepted the same as according to their respective contracts of purchase with the said W. C. Harding Land Company; that thereupon and in reliance upon said arrangement and understanding with each of said purchasers the said W. C. Harding Land Company at its own expense,

removed said peach trees from said tracts of land and planted instead thereof pear trees and said pear trees have ever since continued to grow and flourish thereon; that the said Glenn D. Hart, one of the said purchasers, and husband of Mrs. Glenn D. Hart plaintiff herein, prior to July, 1913, became a stockholder in the said W. C. Harding Land Company and a salesagent for said company, selling lands in said Plat "D" of Roseburg Home Orchard Tracts and as such stockholder and salesagent the said Glenn D. Hart was, long prior to July, 1913, thoroughly familiar, by actual inspection, with each of the said lots of land mentioned in the bill of complaint, including the character of the soil thereof, the kind and character of the trees planted thereon, the cultivation and care thereof, and all other facts with reference to the condition and value of said lots and each of them, and that the said Mrs. Glenn D. Hart at the same time had like knowledge with reference to said lots, and neither said Glenn D. Hart or said Mrs. Glenn D. Hart repudiated or attempted to repudiate or rescind or cancel the said contracts of purchase of the lots sold to them by said W. C. Harding Land Company, but that on the contrary, and prior to July, 1913, approved and ratified said contracts, while in full possession of all the facts involved; and these defendants allege that for the reasons just stated neither of said respective purchasers nor the plaintiff herein ought now to be admitted to allege that they or any of them have been damaged by the alleged failure of said peach trees to grow or by any alleged defects in fruit trees, or by reason of the said soil being, as alleged, unfit for the

growing of fruit trees or being in any way deficient or contrary to the representations of said W. C. Harding Land Company at the time of said respective sales, or at any time.

WHEREFORE, these defendants having fully answered, pray that this suit be dismissed, that they go hence without day, and recover their costs and disbursements herein.

B. L. EDDY,  
Attorney for Defendants  
Adair, Epperly, Burns,  
Green and Wallace.

AND AFTERWARDS, to-wit, on the 18th day of May, 1914, there was duly filed in said Court and Cause an answer (agreed statement thereof) in words and figures as follows, to-wit:

Comes now W. C. Harding Land Company for itself alone and makes answer to the bill of complaint herein as follows, to-wit:

Answering plaintiff's first cause of suit:

# I.

Denies that on or about the 21st day of March, 1910, or prior to the making of the alleged agreement between this answering defendant and the plaintiff Mrs. Glenn D. Hart by or through the representatives of this answering defendant or its agent or sales manager T.

W. Kendall, or by or through any person whomsoever, at Deadwood, South Dakota, or at any place for the purpose of inducing plaintiffs to purchase said lot 18 in Plat "D" or otherwise or at all, or to induce her, the said Mrs. Glenn D. Hart, to make her first payment on said purchase price falsely or fraudulently stated or represented to plaintiff that said tract of land comprising ten acres and designated as lot 18 in Plat "D" was worth the sum of thirty-five hundred dollars (\$3500) or that the three tracts then remaining unsold, namely, lots 17, 18 and 19 of said Plat "D" were the choicest tracts of the entire plat, or that this answering defendant or any one of it or in its behalf falsely or fraudulently stated or represented that any examination or report showed the soil in any of said lots to be particularly adapted to the growing of apples or peaches, or that said tract of land had the best soil of that section of the Umpqua Valley for that purpose, or as good as the volcanic ash soil of the Wenatchee district of Washington, or that the soil of said tract was a deep rich loam or easily cultivated, or that the tract was a sort of upland or had perfect drainage or that this answering defendant or any of its agents ever misrepresented in any particular by views, blue prints, booklets, plats, maps or otherwise to any of the plaintiffs or either of them, the condition of said land or the soil thereof, and allege the fact to be that the said tract of land is a rich soil well adapted to the growing of apples.

## II.

Denies that this answering defendant or any one in its behalf or in its name authorized so to do ever stated or represented that it was not necessary to make a trip to Oregon to look over or examine said lots of Plat "D" or that it was entirely safe to buy it relying solely upon the statements of this answering defendant, or those made by the alleged agent of said defendant, or that the plaintiffs, or either of them, could rely or depend upon said agent's representations, or to take his word for the quality or character of the soil, for its adaptability for orchard purposes, but alleges the fact to be that this answering defendant through all of its officers and agents at all times at great expense of time and money displayed the land offered by it for sale and at all times urged all prospective purchasers to visit and carefully examine the land before purchasing it;

Denies that this answering defendant or any one in its behalf by its authority or the said T. W. Kendall, ever made any statements or representations that were false or fraudulent or any such representations or statements which were known to be false to any of the defendants herein, or were made with intent to deceive or defraud the plaintiffs or either of them, or for the purpose of inducing her to enter into said alleged contract of purchase.

## III.

Denies that the plaintiff Mrs. Glenn D. Hart reposed any special trust or confidence in this answering

defendant or its alleged agent T. W. Kendall or other representatives; Denies that any of the defendants, and particularly this answering defendant ever intentionally or purposely either by its officers, agents or any of its representatives ever at any time made any false representations or statements to the plaintiffs or either of them.

#### IV.

Denies that said Lot 18 of Plat "D" is now worth to exceed fifty dollars (\$50) per acre or is worthless when planted to apples and cultivated for three years as provided in said contract, than the sum of three hundred and fifty dollars (\$350) per acre, or that its use or value exists only for ordinary farming purposes when drained by tiling, or that it lies very low or is bottom land or in a swale or that during high water in the rainy season or at all the nearby creek overflows or sweeps over part of said lot or that the water stands on it during the winter months, or does not drain away, or that the subsoil is a sort of joint clay, very tough or of the nature of "hard pan"; Denies that the soil of *set* lot is not adapted for orchard purposes or is entirely or at all unfit for the growing or production of apples; or that during the summer or dry season said soil dries out, bakes or becomes very hard or cracks unless the cultivation thereof is thoroughly neglected or that when plowed it turns up in great chunks or clods, or is almost impossible of cultivation, or that it is even difficult of cultivation, or that its particular quality character or location make it worthless or in any degree for orchard

purposes or to the growing or culture of apple trees or to maintain the same; and alleges the fact to be that said soil is of a deep rich fertile nature and when properly cultivated, very productive of practically all kinds of vegetables, cereals and fruits grown in the Umpqua Valley.

## V.

This answering defendant further alleges in explanation that unknown to it at the time the sale was made to the plaintiff, said land is not particularly well adapted to the growing of peaches, but is well adapted to the growing of apples and pears and produces such fruit in great abundance and of the choicest quality. That it is not true that said land is utterly worthless for orchard purposes or to the growing or culture of apples or peach trees or to maintain the same, although said land is not as well adapted to the growing of peaches as some other land in the same vicinity, or as to the growing of apples and pears and other fruits.

## VI.

This answering defendant denies that for the purpose of persuading or inducing plaintiffs or either of them, to purchase said lot 18 of Plat "D" aforesaid or other land or to make such cash payment or other or subsequent payments thereon, the defendant, by its agents or officers or representatives or at all, falsely stated or misrepresented to the plaintiffs, or either of them, that if plaintiff would enter into said agreement or purchase lot 18 of Plat "D" or make said payments therefor, that

the defendants would plant said tract to Spitzenberg or Newtown Pippin apple trees, the peach tree fills not less than forty six to the acre, or give thorough cultivation or care to the same in every detail necessary to the proper growing of said trees for a period of three years, or during said time to replace any trees that should from any cause die or become injured, or that they would deliver to this plaintiff a full set thoroughly cultivated or planted as alleged, or that all or any of said statements or representations or promises were false or fraudulent, or that the defendants knew said statements or representations or promises were made to mislead or deceive the plaintiff, or that plaintiff was damaged as set out in plaintiff's complaint by any of said statements, representations or promises as alleged in her complaint or otherwise or at all.

## VII.

This answering defendant alleges the fact to be that this answering defendant did plant said tract in all respects as it promised to do and did carefully and in a good horticultural and husbandlike manner cultivate and care for said tract after the same had been so planted for the full period of three years.

That if said tract is not now in good condition or was not in good condition at the time the complaint of plaintiff was filed in this suit, that such lack of good condition is due to the negligence of the plaintiff since the period of three years during which this answering defendant was to care for the same had fully expired.

## VIII.

Denies that the plaintiff on the . . . . . day of July, 1913, or at any time discovered or learned that the alleged misrepresentations regarding said lot 18 of plat "D" were false or untrue, or that the said representations were false or untrue, or thereupon or at all notified defendant that further payments would not be made upon said contract on account of said alleged fraud.

## IX.

Denies that the plaintiff is now ready or willing to do that which in equity or good conscience she should do in reference to the said agreement on said lot.

## X.

Denies that this answering defendant or any of the defendants ever gave any assuance or gave to the plaintiff any reason for understanding that something would be done by the defendants towards rescinding the contract referred to in plaintiff's complaint.

## XI.

Denies that the plaintiff has sustained damage by said alleged acts of the defendants in the sum of one thousand four hundred and sixty-seven and  $48/100$  (\$1467.48) dollars or in any sum whatever, either with or without interest.

Further answering plaintiff's said first cause of suit, this answering defendant alleges that the peach trees

planted upon said tracts of land were so planted there for temporary purposes only, and were not intended either by the plaintiff or this answering defendant as a permanent improvement of the tract of land described above.

That as soon as this answering defendant ascertained that the peach trees so planted did not flourish as this answering defendant believed that they would, it did everything in its power to fully perform and comply with the exact terms of its contract with the plaintiff, and did offer thereafter to substitute pear trees as such fillers for the peach trees for the reason that it was known that said soil and climate was especially adapted to the growing of pears.

That since the expiration of this answering defendant's contract with the plaintiff to cultivate and care for said orchard planted on said tract the plaintiff has utterly and wholly neglected to properly cultivate and attend to said land and said orchard thereon, and by reason of such neglect and want of care on behalf of the plaintiff the said orchard is not in as good condition as it would have been had proper attention and care been given it by the plaintiff.

That at the expiration of this answering defendant's contract for the care and cultivation of said tract of land and the orchard thereon, the same was in good first class condition, and in all respects as represented by this answering defendant except possibly that the peach trees remaining thereon were not as vigorous or as healthy as it was hoped they would be.

And answering plaintiff's second cause of suit this defendant specifically denies the allegations set forth in the same except the making of said contract of sale and the payments made thereon, the ownership of the land and some other formal matters, and pleads affirmative matters substantially as in answer to first cause of suit.

And answering plaintiff's third cause of suit this defendant specifically denies the allegations set forth in the same except the making of said contract of sale and the payments made thereon, the ownership of the land and some other formal matters, and pleads affirmative matters substantially as in answer to first cause of suit.

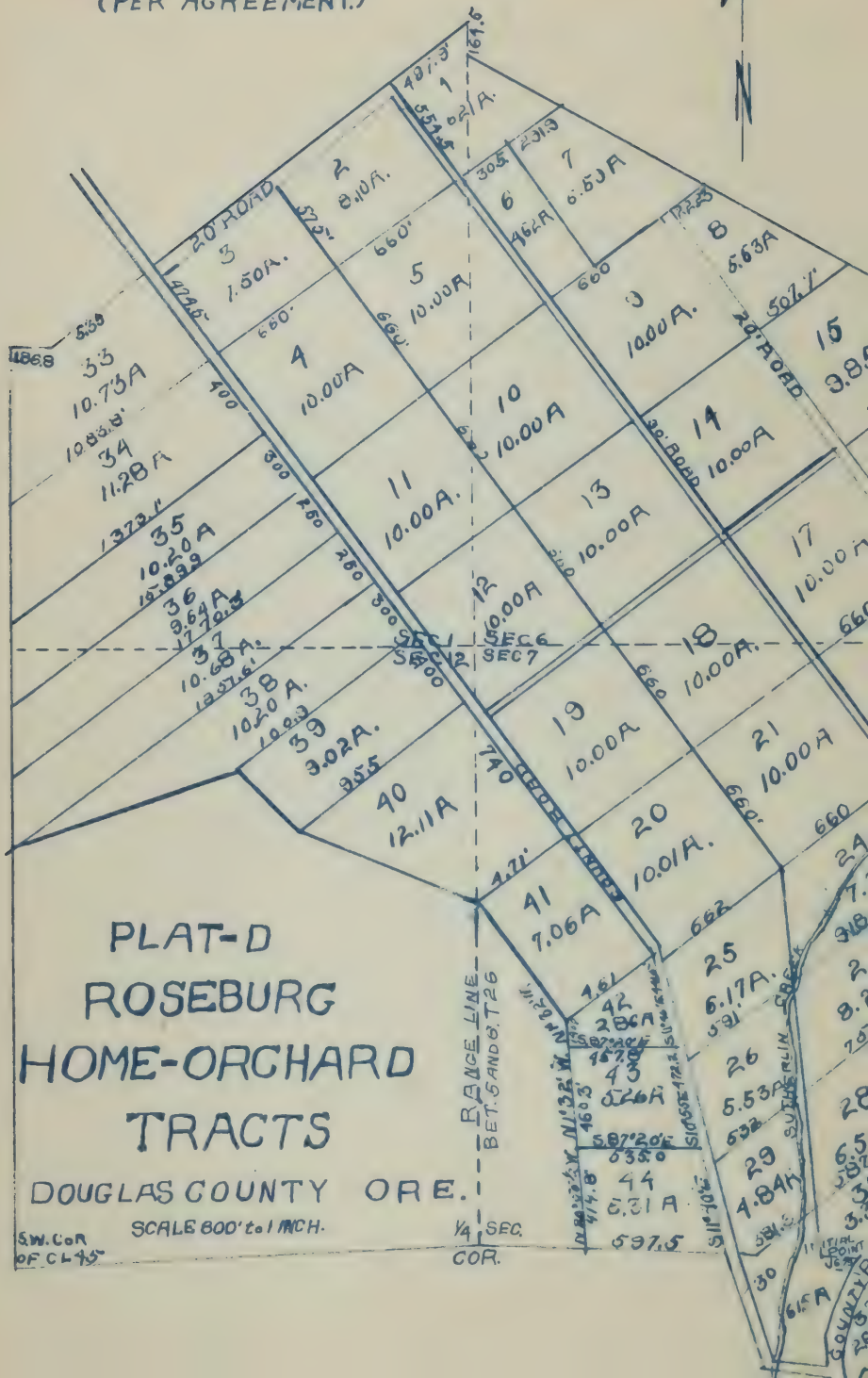
WHEREFORE this answering defendant having fully answered the bill of complaint of the plaintiffs prays that this suit be dismissed and that it go hence without day and recover its costs and disbursements herein from the plaintiffs.

O. P. COSHOW,  
Attorney for Defendant W  
C. Harding Land Com  
pany.



# PLANTIFFS EXHIBIT "C"

(PER AGREEMENT.)



AND AFTERWARDS, to-wit, on Tuesday, September 30, 1914, the same being the 75th judicial day of the regular July, 1914, term of the United States District Court for the District of Oregon—Present the Honorable R. S. Bean, United States District Judge, presiding—the following proceedings were had in said cause, to-wit:

Plaintiff's Counsel: We desire to introduce in evidence, at this time, the following document, which has been marked for identification Plaintiff's Exhibit "C," this exhibit is introduced in evidence by stipulation and agreement between counsel for plaintiffs and defendants without objection.

The same was so received and is (per agreement) as follows:

(See blue print on opposite page.)

(Testimony of L. J. Chapin)

And thereupon witnesses on behalf of plaintiffs and defendants, after being duly sworn, testified as follows:

L. J. CHAPIN

A witness on behalf of plaintiff, testified as follows:

### DIRECT EXAMINATION.

My official title is county agriculturist for Marion County, which position I have held since September 1, 1912.

My duties are to assist the farmers in increasing their incomes, raising their standard of farming, improving their agricultural conditions and includes any phase of agriculture.

I have never taken horticulture as a special phase. I graduated from Washington State College in 1911. I left college and took the position as Agronomist at the Western Washington Experiment Station; served there until I took this position.

I took at college the course classified as the Agronomy course, which includes the study of soil and crops.

Orchards and orchard lands come under my observation as all other crops do. I think that has had as much attention as the other lines of agricultural work.

Mr. Rader, the county agriculturist for Lane County, and I were on a trip to Southern Oregon. We stopped off at Wilbur at Mr. McCroskey's request, and examined the Roseburg Home Orchard Tracts, or Plat D. Mr. Crosky had a plat. Plaintiff's Exhibit C is

(Testimony of L. J. Chapin)

the plat that I had at the time of my visit there and I used this in locating these tracts. I was on 17, 18 and 19 of these tracts. I was asked to examine the physical condition of the soil and I did so. I classified that soil as a clay soil; a very fine clay soil ordinarily spoken of as an adobe soil, properly classified, I presume as a playa clay soil. Playa is a beach or level plane. It is a Spanish word, referring to low lands; it is used as a classification of very fine clay soil, probably more popularly known as adobe soil. It is called in that vicinity I think—I was talking with a man just over the fence from where we stopped at the man's farm—he called that adobe soil.

We dug into Lot 17 four or five holes to a depth of about 18 inches, or more. The difference between this soil and what was found on the surface was that it was a sub-soil. The sub-soil is somewhat finer clay, tending towards a blue color; very fine clay, apparently almost impervious to water, judging from the condition we found the land in. That is, it is capable of preventing water from soaking through it. The moisture, of course, under those conditions has to pass off by evaporation, and it leaves the surface very hard. Salts are all deposited at the surface and the soil is rendered very hard at the surface, under such conditions. There is also a tendency to crack; it always cracks under such conditions. This explains very well the physical condition of the soil I think.

We took samples from each of the holes we dug; I think it was taken for the purpose of examination.

(Testimony of L. J. Chapin)

We walked over all three of them and examined them carefully.

As to what this land is adapted for, I could judge only from the vegetation that was growing there. The grasses, the rye grasses and various other grasses that are especially adapted to wetter lands, were in evidence. If I were asked to recommend a crop for it, I would say it would be adapted to growing such grasses as English, and Italian Rye Grass, Red Top and other grasses that are adapted to wetter lands and heavy wet soils. The fact that it is not drained, of course, and is very wet near the surface, is evidence that it is not fit for the growing of any kind of fruit trees, in its present condition. It would be possible to put it into a condition by artificial drainage. By this I have in mind sub-surface or underground drainage—tile drainage. If I may explain the difference between that and surface drainage, I would say that surface drainage under such conditions does not drain the subsurface. Because the sides become cemented over, a surface drain ditch is almost entirely useless as a means of releasing sub-surface water, so all such tracts, would require tile drainage.

So this soil, in its present natural condition, is not adapted for the growing of apple trees.

I was there about June 16th, 1915; at that time there was no surface water on these tracts; the surface was very hard. I recall seeing some trees in a very unthrifty condition; not making a very good growth, because if I may judge from the looks of the ground,

(Testimony of L. J. Chapin)

they hadn't been cultivated for some time. That land is very difficult to cultivate under its present condition because the moisture doesn't leave the ground early enough in the year to cultivate it properly and when it does leave it goes out through the surface instead of being under-drained, and leaves the ground very hard, so it is difficult to plow at any time. I don't think it had been cultivated last year, if I may judge from the vegetation and grass, but wouldn't swear to that of course.

I noticed a number of dead peach trees but do not recall whether I saw any dead apple trees. The ground there is naturally very level, but I take it from the ridges and ditches that the parties cultivating it had endeavored to surface drain it. It had been plowed to the trees for a number of years, I should think from the looks, and the tree rows were ridged up and between the spaces were very deep dead furrows. There was just one creek on it, I think across the east end of it—towards the railroad anyway; there was another small creek toward the mountain side, there was along the mountain side parallel to the road, a low lying tract having water courses in it, I think might possibly be termed a swale, but not in these particular tracts.

I saw no rushes or sedge growing on these tracts, to my knowledge or remembrance; there was a ditch running through these tracts, which was dry at that time. We took a soil sample from the bottom, possibly two feet down. I could not tell what the effect of a ditch of that kind would be in the rainy season there or whether

(Testimony of L. J. Chapin)

it could accommodate the water that would gather from the hillside. It wouldn't matter from the physical condition of the soil whether it did or not because the sub-soil condition was such that the surface drainage wouldn't make much difference to it.

By physical examination, I mean the taking of the soil and looking at it, with a glass, examining it with the hands and with the eye. If the vegetation is yellow, and shows an unthrifty condition, it is due to what might be termed nitrogen starvation; that might be due to the fact that the soil is too wet; it might be due to the fact that there is not sufficient organic matter to produce the necessary nitrogen; the evidence would be shown by the condition of the vegetation.

In the event that trees could be grown there, it would probably effect only the size of the fruit; if the tree is in unthrifty condition, it would limit the yield and size of the fruit only; the trees themselves would grow very slowly; be what might be termed a stunted condition. This would be caused by lack of ability to secure an abundance of plant food. I might explain that nitrogen—nitrification, requires three important conditions. First, it must have heat, and second moisture, and third, oxygen. Too much moisture in the soil prevents the action; it needs an amount of all of these—a proper amount of all of these elements. Too much moisture prevents the nitrification, cools the land, and thereby retards plant growth.

(Testimony of L. J. Chapin)

### CROSS EXAMINATION.

I presume that I visit as many orchards as I do any other crop in my work now, but I didn't specially prepare myself for what is termed horticulture.

### REDIRECT EXAMINATION.

In my observation of these three tracts the soil in all three seemed very similar. As to its value for any purpose, it is suited only to grasses, the growing of grasses that are adapted to wetter lands. Its value in money could only be judged from the crops that could be grown. Its value, purely from an agricultural standpoint, what one could get in return from his investment, I would say is worth probably \$50.00 per acre in its natural condition. I base that answer on an examination of about 529 farms in Marion County. We made, that is the Government, made a soil survey, or farm survey in Marion, Polk and Yamhill Counties. We found that after deducting the running expenses, all expenses of farming, charging up 5% interest on the investment that a large percentage of the farms have nothing to credit to what was termed the labor income of the farmer.

### RE CROSS EXAMINATION.

I do not know anything about what the market value of that land may have been in 1910.

(Testimony of H. M. Kimball.)

H. M. KIMBALL

A witness on behalf of plaintiff, testified as follows:

### DIRECT EXAMINATION.

I live in Portland and am a practicing attorney. I am acquainted with Mr. Harding. I don't remember where I first did meet him.

I have been in Roseburg, and met Mr. Harding there, also Mr. Lundburg. We all went out to several tracts there, but I can't recall them by letter. We went with him to the tracts in which Mr. Lundburg was interested at that time, which was the fore part of June, 1913.

I knew at that time what tracts Mr. Lundburg was interested in; it was the Peterson tract, and the two Hart tracts which I had pointed out to me by Mr. Harding. The Peterson tract evidently had been recently plowed, or cultivated at the time we were there. It was reasonably level and the ground, evidently in plowing, had come up in rather hard chunks, and looked rather hard, and I should say, baked.

I went over the tracts with Mr. Lundburg at that time, assisting him in taking pictures and afterward marking the films that we took in the kodak, as to what tracts they were taken on.

Plaintiff's exhibit D-1 was taken on one of the Hart tracts; I think on the middle one; D-2 is also taken on one of the Hart tracts—the one nearest the road that

(Testimony of H. M. Kimball.)

we came in on. We walked through this tract, and the grass was very dense in there—grown high—I should say nearly to the waist in parts, and the ground in parts, was more or less wet; so much so that we got our feet wet and pretty muddy. Many of the trees were missing; that is, they evidently had been set one time, but there were many missing, and those that were there didn't appear to me to be in a healthy condition; those missing had evidently died and not been replaced; some of the old stubs were still there.

Plaintiff's exhibit D-4 was also taken, I believe, on the middle Hart tract. There had been a little plowing done, or cultivating, between the rows or along them, slightly, but it was mostly grown up to grass, but not as high as on one of the other tracts. The leaves of the trees that were growing, especially the peach trees, were curly and yellow.

I could not give a definite idea as to the number of apple trees dead or missing, but I would think about a quarter, either dead or missing in the two Hart tracts, possibly more.

Plaintiff's exhibit D-5 is a picture taken on the Peterson tract, which had been recently cultivated; the picture in the foreground is my own.

Plaintiff's exhibit D-6 was taken on the Peterson tract near one of the edges of the tract, as I recall. I should think the ground covered by this picture would be two or three acres in extent. The major part of that was uncleared; there were some rocks and a lot

(Testimony of H. M. Kimball.)

of stumps and snags. I do not know the kind of rock, but it was a heavy rock that seemed to be imbedded in the soil more or less. I should say, it was a boulder.

Plaintiff's exhibit D-7 was taken on the Peterson tract.

On all of these pictures, excepting D-6 the surfact looks bumpy and broken, which as I remember it are clods of earth that as it was plowed up did not pulverize fine; there were more or less small stones on it; this was true of all the Peterson tract that had been plowed.

Plaintiff's exhibit D-8 was taken on the Peterson tract from about the same point of the picture where I appeared, but in a different direction.

### EXAMINATION BY THE COURT.

I think those pictures would go well together. The one I am in would be about a half of the Peterson tract, and the other would be about a half; might not include quite that much.

### DIRECT EXAMINATION CONTINUED.

On the Peterson tract, it seemed to me there were a great many more trees missing than on the other tract, although that may have been because it showed up plainer, the ground having been cultivated, but in all of the tracts there were more or less trees missing.

In explanation as to the condition of these two Hart tracts, Mr. Harding said that if we had only come a

(Testimony of H. M. Kimball.)

few days later they would have been in better condition; that is, he would have had them cultivated. He also said he had been disappointed in the cultivation of all three of the tracts; that they had been sadly neglected. I don't recall when he said the Peterson tract had been plowed; my memory is that it had been plowed shortly before we were there. He said this tract had caused him more trouble than all the other tracts and that it was a mistake to set it to orchard.

**THE COURT:** You spoke about the land being wet, about getting your feet muddy in walking over it. Was that due to the natural location, or to recent rains? These pictures indicate that there was more or less slope from the hillside.

**WITNESS:** The tracts, as I remember them, were almost level; there was a slight slope to them, but were almost level. I don't think there had been a recent rain anywhere near at the time we were there, but I think it was rather water, or moisture, that had remained in the ground.

Pictures offered in evidence and marked Plaintiffs Exhibits D-1, D-2, D-3, D-4, D-5, D-6, D-7, and D-8.

**PLAINTIFFS COUNSEL:** If the Court please, we desire at this time to introduce in evidence on behalf of the plaintiff the following documents which have been marked for identification Plaintiff's Exhibits A, B, E, F, and G, and we desire the record to show that these Exhibits are offered and received in evidence by

stipulation and agreement between counsel for plaintiffs and defendants, without objection. The same were so received and are in substance (agreed statement thereof) as follows:

Plaintiff's Exhibit "A":

(This is the contract between the owners of Plat D and the W. C. Harding Land Company and is the same contract referred to as Exhibit "A" in plaintiff's bill of complaint.)

"THIS AGREEMENT made and entered into this 10th day of September, 1910, by and between Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, parties of the first part, and the W. C. Harding Land Company, an incorporation incorporated, organized and existing under the laws of the State of Oregon, and having its principal office and place of business at Roseburg, Oregon, party of the second part, WITNESSETH: WHEREAS the said J. T. Epperly, James P. Burns, Walter Adair, F. S. Green and one C. H. Carney, to whose interest the said L. B. Wallace has since succeeded, did on the first day of July, 1909, enter into a certain written agreement, of which the following is a copy, to-wit:

'Memorandum of agreement made and entered into this first day of July, 1909, by and between S. H. Carney, J. T. Epperly, James P. Burns and Walter Adair and F. S. Green, hereinafter known as parties of the first part and W. C. Harding Land Co. party of the second part.

Witnesseth: That Whereas parties of the first part have, or are about to purchase the ranch near Wilber, Oregon, known as the Rice & Rice Ranch, or the Jack Chenoweth ranch, consisting of four hundred and sixty one acres, more or less and hereby enters into the following arrangements with party of the second part for the subdivision and sale of said property, upon the following terms to-wit:

First: Party of the second part shall have entire management of the sale of said tracts for the period of one year from date, provided they use all diligence and made every effort to *consummate* the sale of said property, after it is subdivided into its several tracts. But it is expressly understood that the party of the second part shall have negotiated at least Sixty Thousand Dollars worth of bona fide sales upon said property, within the above specified time, or forfeit any equity they may have in this contract, other than the commissions hereinafter agreed upon.

It is furthermore understood and agreed that the minimum price per acre to be charged purchasers for this property shall be Two Hundred Dollars, barring exceptions that both parties to this contract shall agree to in writing.

It is furthermore agreed that as fast as the land sales are consummated that the first Thirteen Thousand and Sixty One Dollars of contracts shall be placed in escrow at the Douglas National Bank in favor of Napoleon Rice and associates, from whom the deed to this

property comes. That the next Ten Thousand Dollars of Contracts shall be and become the property of the first parties to this agreement and the balance of the contracts and property shall be equally divided between the first and second parties to this agreement.

It is furthermore agreed that all the cash taken in from the sales of the above mentioned tracts, except what is allowed party of the second part to this agreement, for the exploitation and sale of the land, shall be and become the property of the first parties to this agreement, and as fast as it is so paid to the parties of the first part they shall give due credit against the Ten Thousand Dollars of contracts above mentioned. It being the intent of this agreement that the first parties to this agreement shall receive a total of Ten Thousand Dollars in cash and contracts for the cash they advance to purchase the property.

It is further agreed that said second party to this agreement shall immediately proceed to have this entire tract of land surveyed and subdivided into forty, or more, tracts; that they will get the land into proper shape to exploit and sell within thirty days from the date of this agreement and proceed with all due diligence in the sale of the tracts.

It is furthermore understood and agreed that the party of the second part shall bear all expense whatsoever nature attending upon the sale of this entire tract, and shall be allowed the following commissions for so doing, which they will be allowed to deduct from the

first cash received, namely, seventeen and one-half per cent.

It is furthermore agreed that the selling price of this land proper shall be Two Hundred Dollars per acre, and that the party of the first part shall not be held responsible in any way for the planting contract and care of the trees that party of the second part makes with possible investors; nor shall the party of the first part benefit from the added price that will be put onto the land for such planting and care.

It is furthermore understood and agreed that the above tracts are to be sold under the name of the W. C. Harding Land Company, and the proper officers of the same are to sign the contracts, but deeds are only to be given by parties of the first part or their Trustee.

In witness whereof said parties have hereunto set their hands and seals the day and year above mentioned.

(Duly signed, sealed and witnessed by the parties thereto.)

AND WHEREAS under and by virtue of said agreement, the said W. C. Harding Land Company has platted about Three Hundred and fifty-five (355) acres of said land, being the whole thereof except what is known as the hill land, and said plat is known as Plat "D" Roseburg Home Orchard Tracts; and WHEREAS the said W. C. Harding Land Company has negotiated the sale of various lots or parcels of said lands as platted and has entered into contracts with various purchasers, as shown by the following list:

(In the original contract then follows a list of twenty-five purchasers of tracts in Plat "D," Roseburg Home Orchard Tracts, to whom contracts were issued prior to September 6, 1910, among which Glenn D. Hart and Mrs. Glenn D. Hart are shown as purchasers of Lots 19 and 18 respectively, and the list shows contracts issued wherein the aggregate price of the land sold is \$72,614.50.)

AND WHEREAS the said W. C. Harding Land Company is making said contracts with said purchasers, included and embodied in one contract an agreement for the sale of the land and also an agreement for the planting of the land to trees and the cultivation thereof for a period of three years, AND WHEREAS the said W. C. Harding Land Company, has failed to deposit in the Douglas National Bank, the contracts required by the provisions of said agreement of July 1, 1909, AND WHEREAS it is to the interest of all parties concerned that a new agreement be entered into, modifying said agreement of July 1st, 1909, and also embodying new covenants and conditions which the said parties have mutually accepted.

NOW THEREFORE, it is mutually covenanted, understood and agreed by and between the said parties as follows:

1. In order to secure the payment of the sum of Thirteen Thousand and Sixty-one Dollars which in said former contract was to be covered by a deposit of sale contracts at the Douglas National Bank of Roseburg, Oregon, in favor of Napoleon Rice and associates for

the purpose of liquidating a mortgage held by said persons upon said lands, and also in order to secure to the parties of the first part the payment of said sum of Ten Thousand Dollars which they are to receive from the net proceeds of said lands after the payment of the said Napoleon Rice mortgage, the parties hereto by written agreement with the Douglas National Bank of Roseburg, Oregon, shall at the time of the execution of this agreement, deposit with the said Douglas National Bank, a sufficient number of the sale contracts now in hand and which have been entered into between various purchasers and the said W. C. Harding Land Company, to equal Twenty Three Thousand and Sixty-one Dollars, or more, at the rate of Two Hundred Dollars per acre for the land, it being the intention of the parties hereto that such proportion of sale contracts as shall be applicable to the said planting and cultivation contracts of the W. C. Harding Land Company shall not be counted as a part of said deposit of Twenty Three Thousand and Sixty-one Dollars and the contracts so deposited shall be sufficient in amount to equal Twenty Three Thousand and Sixty-one Dollars, or more, without reckoning the proportion thereof applicable to planting or cultivation, and the segregation of the amounts to be paid on said contracts shall be made on the basis of Two Hundred Dollars per acre for land itself embraced in said contracts. Said party of the second part shall duly assign and transfer said contracts to said parties of the first part and shall include in said assignment a provision to the effect that the said parties of the first part shall not be liable to cultivate and care

for the lands embraced in said contracts or any part thereof, and it is to be at all times understood that the parties of the first part are not to be in any way liable or responsible for the performance of said contracts for planting or cultivation or any part thereof, or for any costs, damages or charges whatsoever in connection therewith. And in consideration of the mutual covenants and agreements of the parties hereto and particularly the extension of time and other concessions granted herein by the parties of the first part, the party of the second part does hereby guarantee full payment and performance of all the stipulations of all of said sale contracts made on said lands described in said agreement of July 1, 1909, on the part of the respective purchasers.

It is understood that the contracts deposited as hereinbefore provided for shall be those selected and approved by the parties of the first part hereto and the terms and conditions of the deposit shall be set out in a tri-partite agreement in writing to be entered into between the parties to this agreement and the said Douglas National Bank, to the effect that said bank shall hold said contracts in trust and the makers of said contracts shall *to* notified to make payments thereon to said bank, to be received and disposed of by it in the following manner, to-wit: Each payment received is to be divided into two parts, one part to bear the same proportion to the payment made that the value of the land embraced in the particular contract at the rate of Two Hundred Dollars per acre, bears to the total purchase price named in said particular contract and this part of said payment is to be applied by said bank first

to the payment to the parties of the first part of the sum of Eight Hundred Dollars and subsequent payments upon the said Rice mortgage as often as such items shall amount to One Thousand Dollars, or such less sum as the holders of said mortgage may be willing to accept and endorse on the promissory note secured thereby; after the security of the said mortgage in full, the same proportion of subsequent payments upon said contracts shall be placed by said bank to the credit of the parties of the first part herein to apply upon said Ten Thousand Dollar payment hereinbefore mentioned and shall be paid to and divided between the parties of the first part by said bank every ninety days, or oftener, and it shall be the duty of said bank to render statements of the conditions of said accounts to the person hereinafter named, who is to act as Trustee of the title to said land. The remaining portion of each payment on said contracts being the proportion thereof applicable to the said planting and cultivation amount, shall be placed by said bank to the credit of the party of the second part herein. After the said Eight Hundred Dollars, the said Rice mortgage and said Ten Thousand Dollars to go to the parties of the first part have been paid out of said deposited contracts, and after the parties of the first part shall have received their interest paid on Twenty Three Thousand and Sixty One Dollars of said sale contracts as contemplated in paragraph No. 5 hereinafter set out, then any balance received on account of said contracts applicable to price of land shall be equally divided, one half to the parties of the first part and one half to the parties of the second part.

But the parties of the first part are not to share in that proportion of any payment on any contract held in trust or in the hands of the party of the second part which is applicable to the planting or cultivation clause in such contract.

2. All sale contracts in hand at the end of ninety days from this date shall be deposited in trust for collection in a bank to be agreed upon by B. L. Eddy for the parties of the first part and the party of the second part under an agreement with the bank selected to credit and divide payments applicable to price of land to be received thereon equally between the two contracting parties herein, making due allowance first for any unpaid commissions on sales due the party of the first part and dividing interest on deferred payments as per paragraph numbered five herein.

3. The party of the second part shall proceed with the sale of the unsold portions of said lands and the selling price of the platted portions shall continue to be Two Hundred Dollars per acre as provided in said former agreement, but the hill land shall be sold at such price as will average at least Fifteen Dollars per acre, and the tract known as lot number Thirty-two, consisting of 2.61 acres, on which there is situated a dwelling house and barn, shall be sold for not less than One Thousand Dollars, and when sold, F. S. Green, who has made repairs to said buildings, shall be reimbursed from the proceeds of sale to the extent of the amount invested by him in said repairs up to this date only, and the commission of the party of the second part on the sale of

said tract shall be computed upon the net amount received from sale after reimbursing said Green for said repairs. It is expressly understood and agreed that no contract of sale covering any portion of said lands hereafter to be made shall give to the purchaser more than five years in which to make full payment and upon every such sale there shall be a cash payment of at least twenty per cent of the purchase price. The party of the second part undertakes and agrees to proceed with all due diligence to sell and dispose of, in accordance with the intent and purpose of this agreement, all of the unsold portion of said lands and its authority to make such sales shall continue for six months from this date, and no longer unless by mutual agreement in writing, and time is hereby expressly made of the essence of this contract. The party of the second part shall give the same attention and effort to selling said tracts as it might give to the sale of any other tracts of land which it may have for sale in said county, and in all respects use its best efforts to promptly dispose of said lands by bona fide sale in accordance with the intent and purpose of this agreement. At the expiration of ninety days from this date, the party of the second part shall render to B. L. Eddy of Roseburg, Oregon, for the use and benefit of the parties of the first part, a full statement as to all sales and other business transacted up to said time by the party of the second part under this agreement, and at the same time surrender any pay over to such bank as said B. L. Eddy may designate, for the use of parties of first part, one half of the money realized up to that date from the sale of said land after deducting

commissions of the party of the second part. At the end of six months from this date, the party of the second part shall again render to B. L. Eddy a like statement and shall make a like payment and the parties hereto will at said time divide between them all sale contracts not already deposited in bank under this agreement and all contracts deposited under paragraph numbered two and all cash and hold their separate shares of the proceeds of this venture, in severalty except as to the deposit of contracts provided for by paragraph numbered one, and at the expiration of said period of six months from this date, the authority of the party of the second part to make sales of said land, shall cease and determine unless extended by mutual agreement in writing, and any unsold parcels of said land shall revert to the parties of the first part free from any control or interest of the party of the second part. In making said agreement and division of contracts and cash, allowance shall be made for said selling commission of the party of the second part and of interest on deferred payments accrued to the parties of the first part.

4. It is understood and agreed that as soon as practicable after the execution of this agreement, the parties of the first part shall convey all of the said lands embraced in said agreement of July 1, 1909, to B. L. Eddy of Roseburg, Oregon, as Trustee to hold the legal title thereof in trust in order that he may execute conveyance to purchasers of parcels of said land when such parcels shall have been paid for in full, and said Trustee shall also be duly authorized to execute and acknowledge and file for record the necessary plat and dedication

thereof at the expense of the party of the second part, including the dedication of roads and ways in order that said lands may be deeded with reference to said plat in compliance with the Statutes of the State of Oregon.

5. It is understood that all deferred payments provided for in contracts for the sale of said lands shall draw interest at six per cent per annum, and that the parties of the first part shall be entitled to such proportion of said interest as the price of the land itself shall bear to the sale price of the various tracts, and the party of the second part shall be entitled to any interest paid upon such proportion of the deferred payments as shall be applicable to its cultivation contracts.

6. It is understood and agreed that as to any sale contracts to be hereafter turned over to the parties of the first part under this agreement, or at any time deposited in escrow hereunder, the party of the second part does hereby not only guarantee full payment of the sums named therein by the respective purchasers under said contracts, but undertakes and agrees that as to every such contract as turned over or deposited, it will also faithfully perform every stipulation on its own part to be performed under the same, including planting and cultivation of the land, and will at all times hold the parties of the first part, and each of them harmless from all costs, charges, expenses, damages and claims of every kind arising on account of any such contract made by the party of the second part with any purchaser for planting or cultivating any of said lands.

7. In construing this agreement it is to be borne in mind at all times with reference to any settlement or division of receipts or profits or sale contracts, that the parties of the first part are not to share in any payments made on account of planting or cultivation of any of said lands, except under sale contracts which have been set over and transferred to them upon a division. To determine what payments are applicable to purchase price of land and what to planting or cultivating where both are united in one contract, regard is to be had to the selling price of the land as fixed by this contract and the proportion said price bears to the price fixed by the party of the second part in the contract with the purchasers.

The terms of the foregoing agreement are modified before signing in the following particulars, to wit: First, it is understood and agreed that the sum of Eight Hundred Dollars to be paid out of the contracts deposited with the Douglas National Bank, as mentioned on page 6 hereof, is to be deducted from the Ten Thousand Dollars payment which goes to the parties of the first part, and wherever the said Ten Thousand Dollars payment is mentioned the same shall read Nine Thousand Two Hundred Dollars; Second, the guaranty entered into by the party of the second part on page 5, is to be modified by adding thereto the following provision, namely: "But as regards the time of performance of said contracts on the part of the said purchasers, substantial compliance with the contracts shall be sufficient."

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this September 10, 1910."

(Duly signed, sealed and witnessed by the parties thereto.)

PLAINTIFF'S EXHIBIT "B":

(Deed from owners of Plat D to B. L. Eddy, Trustee.)

"KNOW ALL MEN BY THESE PRESENTS, That we, Walter Adair and Hattie M. Adair, husband and wife, and Fred S. Green and Era A. Green, husband and wife, and L. B. Wallace and Eula Wallace, husband and wife, and J. T. Epperly, a single man, and James P. Burns and Daisy P. Burns, husband and wife, in consideration of one dollar and other valuable considerations to us in hand paid by B. L. Eddy, Trustee, of Roseburg, Oregon, have bargained and sold and by these presents do grant, bargain, sell and convey unto said B. L. Eddy as Trustee, the following described property, situated in Douglas County, Oregon, to wit:

(In the original deed appears a description of the several tracts or parcels of land, portions of which were platted as Plat D, Roseburg Home Orchard Tracts, the technical description of which is omitted by agreement.)

To have and to hold unto the said B. L. Eddy forever in trust, however, to hold and dispose of the same for the benefit of the grantors herein, with full power and authority in said Trustee to make, execute and

deliver deeds, conveyances, contracts and assurances of title with covenants of warranty, conveying said lands in suitable parcels, when paid for in full, to purchasers thereof through the W. C. Harding Land Company, a corporation, incorporated, organized and existing under the laws of the State of Oregon, and having its principal office at Roseburg, Oregon, in accordance with the terms of a certain agreement in writing providing for the sale of said lands and dated September 10, 1910, and executed on the one part by the grantors herein and on the other part by the said W. C. Harding Land Company. And in case there shall be any residue of said land remaining unsold through or by the said W. C. Harding Land Company under the terms of said agreement of September 10, 1910, and after the termination of the authority of said W. C. Harding Land Company to make sales thereof, such residue of land shall be reconveyed by said Trustee to the grantors herein, or their assigns. And the said Trustee is duly authorized and empowered to make, execute acknowledged and file for record in the office of the County Clerk of Douglas County, Oregon, a plat and dedication of said lands dividing the same into tracts and laying off and designating roadways through the same, and to do whatever may be incidental to the proper platting of said tract, in accordance with the Statutes of the State of Oregon, in that behalf provided.

And We, the grantors above named do covenant to and with the grantees of our said Trustee, said grantees being those hereafter named in deeds to be executed by said Trustee, that the above granted premises are free

from all incumbrances excepting a mortgage for the principal sum of thirteen thousand and sixty one dollars and interest, made in favor of N. Rice and associates and recorded in the Records of Mortgages of Douglas County, Oregon, which mortgage the grantors herein are to pay and discharge as required by its terms; that we will and our heirs executors and administrators shall and will forever warrant and defend the title of the above granted premises and of the respective parcels thereof to be conveyed by our said trustee to the grantors thereof, their heirs and assigns forever.

IN WITNESS WHEREOF we have hereunto set our hands and seals this 12th day of September, A. D. 1910."

(Duly signed, sealed, witnessed and acknowledged by the grantors.)

#### PLAINTIFF'S EXHIBIT "E":

(Contract of sale of Lot 18, Plat D, W. C. Harding Land Company to Mrs. Glenn D. Hart.)

"THIS AGREEMENT, made and entered into in duplicate this 24th day of March, 1910, between W. C. Harding Land Company, Inc., a corporation, of Roseburg, Douglas County, Oregon, party of the first part, and Mrs. Glenn D. Hart, of the City of Deadwood, South Dakota, party of the second part;

WITNESSETH: That the said party of the first part, in consideration of the covenants and agreements herein contained, agrees to sell unto the party of the

second part, Lot 18, Plat "D" of Roseburg Home Orchard Tracts, Douglas County, State of Oregon, as shown and designated on the duly recorded plat of same, for the sum of Thirty five Thousand Dollars, to be paid with interest at the rate of six per cent per annum on deferred payments, in U. S. Gold Coin in four installments as follows: Seven Hundred Dollars on delivery of this contract, the receipt of which is hereby acknowledged, and Seven hundred Dollars on or before the 24th day of March of each and every year thereafter, interest to be paid annually until the entire sum is paid.

It is further agreed that during illness or the unavoidable loss of employment by the party of the second part, the payment on this contract may be suspended for three months, provided notice in writing has been given to and accepted by the party of the first part, but this privilege cannot be exercised more than once, time being the essence of this contract.

Time is the essence of this agreement, and upon the failure of second party to perform her part of this agreement, or make the payments on the dates hereinbefore stated, or default for sixty days, then and in that event the second party hereby forfeits all rights under this agreement, and all interest in said land; and all payments made hereunder shall be considered as rent for said premises and liquidated damages, and said second party agrees to deliver up the possession of said premises to said first party, and to make no further claim thereto.

The first payment of Seven Hundred Dollars to be paid to any person authorized to deliver this contract, and all installments to be paid to the W. C. Harding Land Company at their office in Portland or Roseburg, Oregon.

And the said party of the second part, in consideration of the premises, covenants and agrees to make the above payments punctually as above specified, and the said party of the first part also agrees that when final payments shall have been received it will cause to be executed and delivered, at its own cost and expense, to the said party of the second part, his or her heirs, executors or assigns, a good and sufficient Warranty Deed free from all incumbrances, to the said property, together with an abstract of title.

And the said party of the first part hereby agrees to plant said tract to APPLES of the same commercial varieties as planted in the entire plat, as follows: Spitzenberg's and Newton Pippins with peach tree fills not less than forty six to the acre. Not less than forty eight apple trees to the acre, and to give thorough cultivation and care to the same, with such pruning, spraying and attention in every detail necessary to the proper growing of said trees for a period of three years, from the date of planting. During said three years said party of the first part is to replace any trees that from any cause should die or become injured to such an extent as to render the same other than commercial trees, meaning and intending thereby that said party of the first part will deliver to the said party of the second part a full set, thoroughly cultivated planting as aforesaid.

And the said party of the second part hereby agrees to pay all taxes and improvements that may hereafter be lawfully imposed upon said property, including that for that year 1910.

IN WITNESS WHEREOF, the said parties have hereunto set their hands the day and year first above written."

(Duly signed, sealed and witnessed by the parties thereto.)

#### PLAINTIFF'S EXHIBIT "F":

(Agreed statement of contract of sale of Lot 19 Plat D, W. C. Harding Land Company to Glenn D. Hart.)

This contract is dated March 24th, 1910, and in form and substance is the same as Exhibit "E" (the same, printed form being used) and under like terms, except payments, the W. C. Harding Land Company agrees to sell to Glenn D. Hart Lot 19 Plat D, Roseburg Home Orchard Tracts, for the sum of \$3500.00 with interest on deferred payments at the rate of six per cent per annum, \$700.00 on delivery of the contract, the receipt of which is acknowledged, the balance to be paid at the rate of \$900.00 annually thereafter, and said contract is duly signed by the parties thereto.

Glenn D. Hart, under date of April 23, 1912, in writing thereon for a valuable consideration, granted, sold and assigned to Mrs. Glenn D. Hart, plaintiff, all his right, title, interest, claim or demand in and to said

contract which assignment was duly approved in writing thereon by W. C. Harding Land Company and B. L. Eddy, Trustee.

PLAINTIFF'S EXHIBIT "G":

(Agreed statement of contract of sale of Lot 17 Plat D, W. C. Harding Land Company to Mrs. Ella Peterson.)

This contract is dated October 15, 1910, and in form and substance is the same as Exhibit "E" (the same printed form being used) and under like terms, except as to payments, the W. C. Harding Land Company agrees to sell to Mrs. Ella Peterson Lot 17 Plat D, Roseburg Home Orchard Tracts, for the sum of \$3500.00 with interest on deferred payments at the rate of six per cent per annum of which \$100.00 was paid on April 15, 1910; \$300.00 on May 15, 1910; \$400.00 on November 1, 1910; and \$25.00 per month thereafter until the full amount was paid; contract acknowledged the payment of \$400.00 upon delivery and the contract was duly signed by the parties thereto.

Mrs. Ella Peterson on November 15, 1913, in writing thereon for a valuable consideration, granted, sold and assigned to Mrs. Glenn D. Hart, plaintiff, all her right, title, interest, claim or right of action in and to said contract.

It was then stipulated and agreed between counsel for plaintiffs and defendants that the payments on each of the three contracts as set forth in the bill of complaint

(Testimony of Mrs. Glenn D. Hart.)

were made at the times and in the amounts as therein alleged.

### MRS. GLENN D. HART.

A witness on behalf of plaintiff, testified as follows:

My name is Mrs. Glenn D. Hart and I reside at Deadwood, South Dakota. Glenn D. Hart is my husband.

I know the defendants Mr. Wallace and Mr. Harding and have known Mr. T. W. Kendall for ten years and have had business dealings with him. He came to my home in Deadwood, South Dakota, in March, 1910, representing the Harding Land Company of Roseburg, Oregon, and told me that this was one of the best land companies in the West. He was talking about Plat D and lot 18 in Plat D. He told me that this was rich sandy loam soil equal to volcanic ash, and was especially adapted to growing apples, and was easily cultivated. I asked him if it would be necessary for me to come to Oregon to look this property over before purchasing, and he said that I could rely on anything the Harding Land Company had to offer for sale as they were perfectly reliable. I had perfect confidence in Mr. Kendall and had always known him to be a man of his word.

He said the land was worth \$350 an acre, and they would plant this to apples and put in peach fillers, and that the Harding Land Company would dispose,—and even their literature,—you will find where they say they

(Testimony of Mrs. Glenn D. Hart.)

will dispose of the peaches after the third year, and you could make the rest of your payments on what you would get for your peaches, for the land. He said this was one of the choicest tracts of land, and that he had saved these tracts especially for his friends. He mentioned three tracts, 17, 18 and 19 in Plat D. He gave me some printed literature and said that I could depend on anything those pamphlets contained and that whatever these pamphlets said they would do.

One of these booklets is a large red apple in booklet form and the other was a long booklet with Roseburg on and the apple on the other side. This pamphlet handed me, marked Plaintiff's exhibit H I saw when Mr. Kendall was in Deadwood selling me this land; this was before I signed this contract. I read it at that time and relied upon the statements therein.

Pamphlet offered in evidence and marked Plaintiff's exhibit H; said pamphlets containing the following statements:

"Umpqua Valley, where the ideal apple has been perfected. W. C. Harding Land Co., Owners and Planters, Roseburg Home Orchard Tracts.

Reasons Why You Should Buy an Orchard Tract in the Umpqua Valley: Umpqua Valley surpasses the world in producing the reddest apple. Umpqua Valley raises the very best keeping apple in the world. Umpqua Valley needs no Irrigation and grows all fruit to perfection. Umpqua Valley is entirely free from late frost that injures fruit. Umpqua Valley has a climate that is unexcelled in all the Northwest. Umpqua Valley is

(Testimony of Mrs. Glenn D. Hart.)

the most picturesque of all the valleys in Oregon. Umpqua Valley has the largest planting of the famous Spitzenberg and Newton Pippin apples in the State of Oregon. Umpqua Valley has pure water, furnished from the beautiful mountain streams, and within easy access through the soil.

Young peach trees (Early Crawfords). We plant peaches between the rows of apple trees, as peaches yield in their third year and never fail in the Umpqua Valley."

When Mr. Kendall was offering this tract of land of the W. C. Harding Land Company to me for sale, he handed me a copy of this pamphlet marked plaintiff's Exhibit I and said it would verify any statement they had to offer for sale of this land. I read that through before I signed the contract and relied upon the statements contained in the same at the time.

Pamphlet marked Plaintiff's Exhibit I offered in evidence; said pamphlet containing the following statements;

"Roseburg Home Orchard Tracts, W. C. Harding Land Co. Owners and Planters. W. C. Harding Land Co. are the pioneers in planting, operating and subdividing large commercial orchards in the Umpqua Valley. During the last two years this company has planted and subdivided over 3000 acres of the choicest fruit lands. Besides this developed acreage, W. C. Harding Land Co. has sold thousands of acres of Umpqua Valley fruit lands to independent orchard planters, individuals and companies who are operating on a large scale, both in pears and apples.

(Testimony of Mrs. Glenn D. Hart.)

W. C. Harding Land Co. is not concerned in the exploitation of any townsite. It has specialized in the planting and dividing of orchards and is the largest exclusive planter of Newtown Pippin and Spitzenberg apple orchards in Oregon."

"The Umpqua Valley: In the production of Newtown Pippin and Spitzenberg apples the Umpqua Valley has stood the test of time. These two varieties were developed to their highest perfection in this valley. For 50 years Umpqua orchardists supplied the markets of California with the apples that sold at almost fabulous prices. With the development of a world market for Oregon apples, the Umpqua Valley was ready, having the large successful bearing orchards yielding the finest and fanciest fruits. This was not an accident. It was because the climate and soil of the Umpqua Valley were so favorable that growers always had found their orchards profitable. Color, keeping quality and flavor are the three great points that secure the highest price for fancy apples, and this is where the Umpqua Valley maintains its prestige. Composition of the soil, protection from frosts, ideal altitude and distribution of rainfall combine to produce in these two fancy varieties a richness of color, spiciness of flavor and soundness of keeping quality nowhere else attained. The shrewd guyers of London and New York pay a premium price for Umpqua Newtowns and Spitzenbergs, contracting for the entire output of large or associated orchards while still on the trees. With the experience of all the Umpqua growers as a guide and inspiration, W. C.

(Testimony of Mrs. Glenn D. Hart.)

Harding Land Co. began the selection of land, purchasing that which was best adapted to their especial purposes and planting it to orchards. There was no need to experiment or take the slightest chance. It was simply a case of following the footsteps of successful growers."

"Disinterested fruit authorities state that the ideal altitude for the production of the fanciest grade of Newtown Pippin and Spitzenberg apples is from 450 to 600 feet above sea level. All of our orchards are at an altitude within this favored zone. As one noted fruit authority said: 'The Umpqua Valley is one of the greatest apple sections of the world; year in and year out its trees yield three apples to one from trees in other celebrated fruit districts.' "

"Earliest of the Early: Eminent authorities at the State Agricultural College pronounce the Umpqua Valley the earliest in Oregon by one or two weeks in maturing berries, small fruits and vegetables for market. No fruit section in Oregon farther south than the Umpqua enjoys so low an altitude, hence none has so early a season. North of the Umpqua, in Oregon and Washington, the season is retarded by the increased moisture. Invariably the Umpqua Valley is the earliest of the early. The confidence prominent orchardists of successful and well known fruit sections of the Northwest have in the Umpqua Valley is abundantly proved by their having invested in our orchard lands and engaged in their development."

"How We Have Planted: On the properties we

(Testimony of Mrs. Glenn D. Hart.)

have divided into small tracts we have planted Yellow Newtown Pippins and Spitzenberg apples, with peaches as fillers between the rows of apple trees. The peach trees stay between the rows until apple trees crowd them out. We planted peaches because in the Umpqua Valley this crop virtually never fails. Peaches begin to yield in three years here, two or three boxes from each tree in the third season, producing so prolifically as to provide an income sufficient for a living and enough in addition to make the payments on the purchase price of the tract. The market for fresh peaches from the Umpqua Valley is unlimited, as no peaches are grown commercially to the North."

"You Can Own a Tract: Our easy payment plan makes it possible for the wage earner or professional man dependent upon a small salary or limited income to continue in his present occupation while acquiring a future home in Roseburg Home Orchard tracts. You can come at any time, establish your home, build your bungalow and cultivate your orchard. If you come prior to the third year, you are sure of an income from raising small fruits, berries, poultry, celery, asparagus, etc. If you come after that, the peach crop provides abundantly both for living expenses and payment on the lands."

"If the owner is not ready to come at the end of three years, W. C. Harding Land Co. will continue to operate the tract at a nominal cost, retaining half of the net proceeds from the crop as its compensation for

(Testimony of Mrs. Glenn D. Hart.)

marketing same, and surrendering to the owner the other half."

"No Experience Necessary: It is not necessary to be a scientific orchardist in order to secure independence and a liberal income from one of our tracts."

"No Irrigation Needed: God irrigates the Umpqua Valley. You do not have to rely upon any artificial rainfall. The advantages are manifold. One of them is that the trees take better root—the roots spread instead of bunching. If the water is brought artificially to the trees, there is no incentive to grow sturdy and hardy roots. With the water distributed naturally by rainfall, the roots spread and go after it, taking a firm hold in the soil and securing strength and moisture at all seasons for tree and fruit."

I saw the land for the first time in July, 1912. In company with Mr. Wallace and Mr. Hart I went out to these tracts of land and instead of finding an orchard I found the weeds higher than the trees, and at least a quarter of the trees dead or missing, and a large part of this land had never even been cultivated. It was all covered with high grass and a swamp; they made excuses as to the land looking so badly on account of not being able to procure help and had had trouble, but would have it attended to. Then Mr. Wallace took us over to Garden Valley. We went over to overlook this Garden Valley and when I returned to Roseburg Mr. Harding told me they would sell these tracts of land and give me some good land in Garden Valley. I had no further conversation with Mr. Harding except that I wouldn't

(Testimony of Mrs. Glenn D. Hart.)

make any more payments until I had something for my money, and I made no payments after that. He said the land had been neglected but they would have it fixed up, cultivated and the weeds taken off.

There weren't very many trees in the low part of the land, and part of it had never been cultivated, and the ground was all dry and hard and cracked. They said they would put pear trees in; they discovered that peach trees wouldn't grow on this soil and they would put in fillers of pear trees on this land, but I didn't tell them to.

There was no comparison between Tract 18 of Plat D and the land I visited in Garden Valley; over in Garden Valley they had trees and we didn't have any; theirs were beautifully cultivated and ours hasn't been cultivated at all. I did nothing further at that time relative to it.

We came out here again in May, 1913, and Mrs. Peterson went down to see the land and came back and told me what condition it was in and said mine was even worse and I went to see an attorney and placed the matter in his hands. My attorney wanted me to meet Mr. Harding in his office to talk with him over this proposition and Mr. Harding refused and wouldn't talk to me about it at all, and then I left it in the hands of my attorney. During the time that I made the first and last trip, Mr. Harding did not make any proposition to me of any kind and I never suggested or said to him that things were satisfactory.

I certainly would not have bought this land and

(Testimony of Glenn D. Hart.)

entered into that contract if I had known these statements made by Mr. Kendall at the time were false. From the time I assumed that land first, I have been ready to do what was equitable in the matter.

### CROSS EXAMINATION.

Mr. Hart attended to almost all the business for me; he conducted the correspondence and did nearly all the business between myself and the Harding Land Company.

### GLENN D. HART.

A witness called on behalf of the plaintiff, testified as follows:

I am Glenn D. Hart, the husband of plaintiff in this action and purchaser of lot 19 in Plat D, Roseburg Orchard Homes. I am a traveling salesman; for the past ten years I have been selling goods on the road.

I know two of the defendants in this action, Mr. Harding and Mr. Wallace and have had business dealings with them.

Mr. T. W. Kendall, representing the W. C. Harding Land Company of Roseburg, Oregon, came to Deadwood, South Dakota, my home, and said that he was selling Roseburg land for the Harding Land Company; said he had something very choice to offer in Plat D of the Roseburg Home Orchard Tracts. And

(Testimony of Glenn D. Hart.)

he showed me pamphlets and maps and photographs of this land. That he was out selling his friends and he had three choice plats left in this Plat D and he wanted to sell me one. So after showing me these maps and panoramic views and telling me about it, and telling me about the character of the soil which he said was a black sandy loam soil equal to volcanic ash and easily tillable, and was the best thing the Harding Land Company had to offer in their holdings,—relying wholly on what he said and what was in these pretty pamphlets, I purchased a ten acre tract. He said he was selling the land at \$350 per acre. That they had secured the best experts in the State of Oregon to examine this land before they ever put it on the market and that these experts claimed this was the best land in the entire valley for orcharding. He said this was the best tract that the Harding Land Company owned; that it was high valley land and that it did not need draining or irrigating. He said the company was the most reliable in the State of Oregon.

I had known Mr. Kendall for ten years before I signed this contract. I suggested to him that it would be well for me to examine it but he told me it was absolutely unnecessary that the company was reliable and that the deal was all right; that I knew him, and had known him for years, and it was absolutely unnecessary to waste that time and money in coming out to see it.

Before I signed up the contract, he handed me one of the books like plaintiff's exhibit H; I read it through

(Testimony of Glenn D. Hart.)

then and relied upon these statements contained in it, which he said were absolutely true.

I saw plaintiff's exhibit I at the time of the purchase of this land, along about the latter part of March, 1910, and read it through at the time and relied on the statements contained in it. Mr. Kendall said anything contained in pamphlet "I" could be relied on as applying to this land in particular.

I would not have entered into this contract for the purchase of lot 19 if I had not believed the statements as made by Mr. Kendall and as contained in these books.

I saw the land first in July, 1912. I tried to see the land along in January, 1911, but it was covered with snow and I couldn't get down onto it; and again in 1912, in February, I tried to see it again, but it was covered so with water I could not see it, so in July, 1912, in company with Mr. Wallace, then secretary of the Harding Land Company and my wife, we drove out to see this and the minute we got out there Mr. Wallace began to apologize about the condition of the land; said that they had been hard up and couldn't get help to take care of the land, and they couldn't plow it, and made all kind of excuses. I simply found a few trees scattered around over the tract, and a big slough in there, never been cultivated or planted, and the weeds were higher than the trees, and after talking around awhile he said: "Let's forget this; I will take you over to Garden Valley and show you some good land." So he drove over to Garden Valley and showed us around for awhile and then took us to Roseburg to Mr. Harding's office; we

(Testimony of Glenn D. Hart.)

met Mr. Harding there and he said: "I want to apologize to you people for the condition that land is in; God Almighty never intended that land to be planted to orchard; I am going to try to sell that land for you people and locate you over in Garden Valley, give you something good." From that time I made no further payments.

### CROSS EXAMINATION.

I was going out to see this land, with a Mr. Jackson; I took a locator and located it all right. Both Mr. Jackson and Mr. Kendall were with me and Mr. Kendall was familiar with the plat and told me in March, 1910, when he was selling me this land that he had visited it several times. We didn't drive any further than to my lot and did not go over 17 or 18 at that time, and did not get out of the buggy that I remember of.

When I first drove to this tract it was covered with snow; that was in January, 1911. The ground did not remain covered with snow during all that time. I didn't go back to see the land after the snow disappeared. The people of the town said it was the biggest snow they ever had down there; it was four inches deep I should judge on my tract of land.

The second time I went to see the land I couldn't tell whether I was dissatisfied or not as I couldn't see enough of it.

I think I entered into business with the Harding Land Company in 1911; I was working for Sleyster &

(Testimony of Glenn D. Hart.)

Kendall in the first place. They were the sales agents for the company; as I remember it, I had a contract in writing with Sleyster & Kendall, and possibly with the Harding Land Company.

The contract you hand me dated March 2, 1911, signed by W. C. Harding Land Company by W. C. Harding, president and by L. B. Wallace, secretary and T. M. Kendall is also signed by Glenn D. Hart, which is my signature. With the exception of the purchase of the lot, I think that is the first business relation I had with the Harding Land Company. Mr. Kendall and I were partners in 1911; as I remember it, the partnership existed for a year. I won't swear that partnership was entered into in 1911; I think I entered into a contract with Mr. Kendall to sell land for the Sleyster & Kendall Company shortly after the time that I bought this tract of land in 1910. I later entered into a partnership with Mr. Kendall himself in 1911; that was after I had tried to see the land.

I don't think I would have seen the land at that time by going back a few days after because the rain in addition, when the snow went away were coming on and you couldn't get to see it.

The letter you hand me dated Deadwood, South Dakota, April 12, 1912, addressed to W. C. Harding Land Company is in my hand writing and has my signature.

Said letter marked Defendant's exhibit A offered in evidence as follows:

(Testimony of Glenn D. Hart.)

“  
Deadwood, S. D., 4/12/1912.  
W. C. Harding Land Co.,  
Roseburg, Oregon  
Gentlemen:

Find enclosed check for \$400.00 to apply on the contract of Mrs. Glenn D. Hart in Plat D.

Yours truly,  
Mrs. Glenn D. Hart.”

Witness: The letter handed me dated Deadwood, South Dakota, March 8, 1915, addressed to W. C. Harding signed by Glenn D. Hart is my letter and my signature.

Said letter marked Defendant's Exhibit 3 offered in evidence as follows:

“  
Deadwood, So. Dak. 3/8/1912.  
W. C. Harding,  
Roseburg, Oregon  
My Dear Sir and Bros.:

Arrived home safely. Had a pleasant trip. Had the pleasure of riding on a fast train. Went by the way of Butte, Montana. Arrived here about the time I expected. Found Mrs. Hart a very sick woman. She is convalescing now, and inside of a week I think she will be so that I can get out and rustle a bit. I hope that Mrs. Harding is better. If I were you when you move to Portland, take the Mrs. along. She will feel better. I certainly enjoyed every minute of your company, and also the rest of the members. The trip was beneficial

(Testimony of Glenn D. Hart.)

to me in more ways than one. I saw the country and when it was looking fine, and I can talk it all the more. Expect a big business here for a few months. Royse is going after them to beat the cars, and I expect that he will sell a great many before the year is out. He wants an office, and his letter to you will explain everything. It is really necessary that he have one, on account of all of his competitors doing business through their office. After I sell one more tract in H, I advise your giving Royse the exclusive sale on Plat H. Kendall and I can sell in Plat C and Garden Valley and then we can sell your twenty acres near Esterbrooks. Write me often. Best wishes to Wallace and all,

Fraternally, Glenn D. Hart."

Witness: At that time I was second vice president of the Harding Land Company and owned some stock for a while and was a member of the board of directors.

The letter handed me dated April 22, 1912, is my letter and signature.

Said letter marked Defendant's exhibit 8, offered in evidence as follows:

Deadwood, So. Dak. 4/22/1912.

W. C. Harding,

Portland, Oregon.

My Dear Sir:

Your interesting letter reached me today. Glad to hear from you. Sorry to hear of Kendall's quitting, but it is all for the best, as he has always been more or less discontented. I want this salesmanagership alone.

(Testimony of Glenn D. Hart.)

and never again do I want a partner, so fix things up for me. I am going out with a determination of doing a big business. I have had the toughest luck since I arrived home. My wife's health has been so bum that I have been unable to work; in fact, she is in bed now. We cannot get anyone to run the news stand and we cannot sell it, so we are up against it in bad shape. I have moved to the hotel now and it will be more pleasant for my wife and easier on her. I am going to get out tomorrow and see a bunch of fellows. Expect to sell some of them this week. Would like to come out to Portland and help you in the office, but I believe you can handle it alright, and I can do more good here. What did Kendall and Wallace fight about, I want to keep Royse just where he is, working for me, then I can get along with him, but if he had the same authority as I we could not live with him. You are right about watching him. He wants more things and attention than anyone I ever saw, and he can sell the stuff alright, but I have got to hold him down. You know that I am capable of being salesmanager and I need the money. I am going to work harder now, because I make 15% before I only made 7½%; had to split it with K. Guess he will settle with me, though.

Write me often and keep me posted. Buy our furniture and credit me up. If I were you I would hire Kendall to put real estate deals over in Portland for you. I think he might work for you because he likes you. Best wishes, I am fraternally,

Glenn D. Hart."



(Testimony of Glenn D. Hart.)

and return to me my notes, I can do something, but I cannot work as I should with that debt hanging over me. I am worried so that I cannot get down to real business. I done good before I became associated with the Company, but have never done well since. If I can be just a common hireling I can do good. Never was any good working for myself, so send along those notes to the First National Bank here and I will return over the stock.

Yours fraternally, Glenn D. Hart."

The letter handed me dated March 20, 1913, is mine and has my signature attached.

Said letter marked Defendant's exhibit 15, and offered in evidence as follows:

Deadwood, S. D., 3/20/1913.

W. C. Harding,

Roseburg, Oregon

My dear Sir:

Walter White of Chadron, Nebraska, is here today and he wants to know all about his orchard. Did the last freeze hurt his trees? How many trees will you have to replace for him? How much of a growth have the trees made since setting out? Is the land in good shape? Have the Kleist Brothers looked after them in good shape the past two years? He wrote you some time ago, but you failed to answer him. I wish you would write him at his home, which is Chadron, Nebraska, and give him all of the news about his land and

(Testimony of Glenn D. Hart.)

the country. Also tell me how Mrs. Hart's lot is in the Glenn D. Hart tract. I am still figuring that I can sell some of your tracts this coming summer. I am for you all the time. I hope that you will prosper and that your company will be the biggest in the world in a few years.

How about the weather out there now? Have you had much winter? Is the land selling much now? Give me all the news. Give me up and I may be able to go out and sell ten acres.

Give my best wishes to your wife. Remember me to Mr. Hinckley. Write a long letter.

Your friend, Glenn D. Hart."

I wouldn't swear as to whether the letter dated November 6, 1912, defendant's exhibit 19, was written before or after Mrs. Hart and I inspected the land. I can't remember whether we were there before the 27th of July, or the day of the week that we were there.

Letter marked Defendant's exhibit 20, offered in evidence, without objection, as follows:

Deadwood, S. D. 11/6/12.

Mr. L. B. Wallace.

## Roseburg, Oregon

My Dear Sir:

I am thinking seriously of caring for my wife's tracts in Plat D this coming year myself. I have a certain knowledge of how to look after an orchard, so will try my hand at it. Very much obliged for the interest you

(Testimony of Glenn D. Hart.)

have shown in the matter. Hoping to see you soon,  
I am

Sincerely, Glenn D. Hart."

I purchased the stock I held in the Harding Land Co. sometime in 1911 I believe, from W. C. Harding and gave my notes in payment. I imagine I held it for about a year. I gave it back to him and he returned my notes. The amount was \$5,000.00.

### REDIRECT EXAMINATION.

I have no knowledge of agriculture; I never spent any time on a farm and do not know anything about the different varieties of soil. All my experience was knowledge gained through my connection with the Harding Land Company in this matter.

The money used in the purchase of this tract belonged to my wife and the payments made afterwards were made with her money and that is an explanation of my signing this contract over to her.

At the time I visited the tract in 1912 with Mrs. Hart and Mr. Wallace I looked at the soil but didn't know anything about it or whether it was adapted to fruit. I have no knowledge which would lead me to a conclusion as to whether any soil was adapted to any particular purpose, so it was necessary for me to rely upon the statements made by Mr. Kendall. I first learned about the falsity of these statements after my wife had turned the proposition over to her attorneys

(Testimony of Glenn D. Hart.)

and they had made an investigation and reported, in May, 1913; down to then I believed that this land was as represented.

In explanation of my letter Defendant's exhibit 20, regarding my caring for my wife's tract in plat D, I wish to state that after having talked with Mr. Harding and Mr. Wallace relative to this land in July, 1912, when I was there and they told me that they were short of money, and couldn't care for the thing properly, I figured out that if I could have someone care for this and get it in proper shape, as I could see it wasn't in very good shape at that time, we might be able in the course of the next year to sell it and get Mrs. Hart's money out of it. Besides I still owed Mr. Harding \$5,000 for the stock and large commissions coming, and that explains it.

I did not sell any of this Plat D during any of the time that I was connected with the Harding Land Company.

I also entered into a contract for another tract of land located in the Glenn D. Hart tract, which is now transferred to my wife, and she still owns it. I never had any complaint or fault to find with that tract.

At the time I was connected with the company I received letters from them relative to my buying some of the stock of the company. I am familiar with the signature of Mr. W. C. Harding.

Letter received in evidence without objection, marked as Plaintiff's Exhibit J, as follows:

(Testimony of Glenn D. Hart.)

(Letter not dated.)

“My Dear Glenn D.:

How the H—— are you anyway. I have been in Portland for ten days so possibly there is a letter from you to me in Roseburg. Will go down tonight and see. Now, I wrote you in my previous letters *get in the game*. Things are all right with us, but we need the business and are depending upon you for it. I have a \$5,000 block of Harding Land Company stock for you and if you want it send me your note, due in a year at 7% and I will transfer the stock on the books and send it to you. Expect to close with my Portland people to-day for \$12,500.00 which is everything that can, by any possible means, be had. I promised you \$5,000 and want you to have it. Wallace tells me the book value of it is nearly, if not quite, \$7,500.00. These Portland people am taking on are worth \$600,000, so we are tying up with a good bunch. Have some sales staked out that will make us a big bunch of money this year, but of that more anon. Upon receipt of this wire me at my expense at Roseburg. I may come east to help you boys out and especially so if you bring a bunch west; in that event if can get away will go back with you. Shall order 2,000 new folders to you by freight; they will start at once.

Very truly yours,

W. C. Harding.”

(Testimony of Mrs. Ella Peterson.)

MRS. ELLA PETERSON,

A witness on behalf of the plaintiff, testified as follows:

I reside in Colorado. I am assignor of the contract for the purchase of lot 17, in Plat D, Roseburg Home Orchard Tracts. I know the defendants in this—that is, Mr. Harding, and I met Mr. Hinkley when I was down there. He was secretary at the time I saw the land.

When I entered into the purchase of this lot 17 I had negotiations with Mr. Kendall; preceding the time I signed the contract he gave me some literature that was sent out by the company and told me they were one of the strongest and most reliable companies in the State of Oregon and were recognized as such. I read the books he gave me.

Plaintiff's Exhibit H which you hand me is either the same book or one of them.

Plaintiff's Exhibit I is another one of the books. At the time these books were given me I read them and relied on the statements set out therein. This was all previous to my signing this contract. Mr. Kendall referred to the contents of these books applying to tract 17 and told me that the company was perfectly reliable; that they wouldn't dare, under the laws of the state to go out and publish literature that wasn't facts, and

(Testimony of Mrs. Ella Peterson.)

he verified all his statements by referring to these books, or nearly all of them. His statements were an inducement for me to sign this contract. He also said the land was a high priced proposition; that the company had taken pains to select choicest orchard land, and every acre, before placed on the market was examined by an expert and proved to be first class orchard land.

Q. Did he put money value in regard to it?

A. Yes, \$350.00.

He said the soil was rich black loam, easily irrigated, or easily cultivated and never needed draining or irrigating. It was high valley land. He said it was pronounced the finest soil for fruit land and equal to the volcanic ash of Washington and was particularly adapted to apples and peaches.

He gave me, or showed me, a blue print of the different plats on this tract. I told him it was quite a little money to invest and not be quite sure what it was. He told me I could rely upon the company being one of the oldest and most reliable companies in the state, also referring to the literature; and I had every reason to believe the company was all right.

I had known Mr. Kindall for at least ten years; I had every confidence in him. I would not have entered into this contract and paid this money had I believed that the statements made regarding this land were untrue.

I first saw the land in the latter part of May, 1913. I went to Roseburg for the purpose of seeing it, with Mr. Hinkley, then secretary, and Mr. Peterson, my

(Testimony of Mrs. Ella Peterson.)

husband. When we stopped in front of the tract that Mr. Hinkley said was mine, of course I was very much disappointed, and it took him some time to convince me that that was the tract that really the company had set aside for me, because I didn't recognize it as an orchard. It hadn't been properly kept, and hadn't been properly cleared. There were two large pieces, one in the center of the tract and one at one side, that hadn't been cleared, and one corner of the tract was taken off by a large creek. It had been plowed but not taken care of any further; looked as though it had just been plowed and planted; a few trees, I wouldn't recognize as trees, little twigs stuck in the ground is what I would call them. I think some of them were alive.

Mr. Hinkley and I talked about it at the time. We joked about it at first calling it an orchard tract and he was a little but confused and made all sorts of excuses about the condition we found it in; he said he was very sorry it had been neglected and that he would take it up with the company when he went back and see that it was taken care of. He took us back to Roseburg to the office and Mr. Harding was there. I didn't talk with Mr. Harding myself, although I was present when he talked with Mr. Peterson.

Mr. Peterson and he talked about the land. Mr. Harding said he knew it was in very bad condition and should have been taken care of, made all sorts of excuses why it hadn't been cared for and the condition the trees were in, etc. He said that he personally would look after it, and felt that he ought to, and that they

(Testimony of Mrs. Ella Peterson.)

had found that peach trees wouldn't do well on this land, and he was in doubt whether apple trees would, but he would replace all the dead trees, both apple and peaches, with pears, and if he discovered later apple trees didn't do well, those would be planted to pears. I didn't care to talk to him at the time for I wasn't in the mood, after seeing the tract, for I didn't consider it an orchard tract.

I made my last payment the first of May before going down. I was out on a vacation with Mr. Peterson and I wanted to settle all matters with the company during our vacation, and I paid up two months in advance, May and June.

The following day, after coming to Portland, I went and saw Mr. Lundburg, an attorney, and told him what I found, and I wanted him to see the company and talk to them and see how the matter could be adjusted.

### CROSS EXAMINATION.

I purchased my land in April, 1910. It was planted the next fall. I saw rocks all over the tract; I thought they were pretty thick for a first class orchard tract, to be properly taken care of and some of them were pretty good size—as big as my head and larger. I couldn't say whether they were smooth rocks, waterwashed rock, or whether they were igneous rocks, found in the hills.

Mr. Peterson was given a letter by Mr. Harding saying he would replace the dead trees in pear trees, which I gave to my attorney.

(Testimony of Mrs. Ella Peterson.)

Letter identified by witness, offered in evidence without objection, marked defendant's exhibit 28, as follows:

Portland, Oregon, May 26, 1913.

"Mrs. F. E. Peterson,

Spokane, Washington.

Dear Madam:

In accordance with the conversation with you today regarding your orchard tract No. 17 in Plat D Roseburg Home Orchard Tracts, situated near Wilbur, Ore., we beg to state that during the planting season of 1913 and 1914 we will remove from said tract the peach trees, now on the same, planted as fillers in the rows between the apple trees, and in lieu thereof we will plant pear trees, half Bartlets and half de Anjou; such pear trees to be planted in the center of the squares formed by the apple trees.

All such trees are to be of first class stock and to be planted in good workmanlike manner.

We will also remove the two or three clumps of stumps now in the orchard, and plant the ground now occupied by the same with apple and pear trees as needed. All apple trees that may be dead at that time are to be replaced, according to the terms of the contract.

Yours very truly,

W. C. Harding Land Co.

W. C. Harding, Pres."

I indicated to Mr. Harding that that would not be satisfactory. I was to continue my payments on it

(Testimony of F. W. Rader.)

and I told him I didn't see any inducement to continue my payments on that land. I told him that before that letter was given. He didn't give me the letter. The letter was given to Mr. Peterson; I took it the following day and consulted my attorney and gave him the letter.

I think Mr. Harding was convinced at the time Mr. Peterson was talking to him that I was not satisfied. My attorneys saw him a few days after I consulted them. I saw my attorney and said I was then ready to talk to Mr. Harding, but he refused to talk to me.

F. W. RADER,

A Witness on behalf of the plaintiff, testified as follows:

### DIRECT EXAMINATION.

I have resided in Eugene since the first of February of this year. I am agriculturist for Lane County and doing extension work for the agricultural college and the government. As agriculturist we are handling all farm problems and are assigned to special territory; for instance, to a county. We spend the bigger part of our time on the farm, with the farmers, answering requests as they come in; any agricultural problem that they may have.

I have had this position over two years. Before then I was agriculturist at the State Training School farm at Chehalis, Washington, for three years. Pre-

(Testimony of F. W. Rader.)

vious to that I was agronomist at the Western Washington Experiment Station at Puyallup for nearly a year; previous to that I was a student at the Washington State College where I completed a four year course, graduating in 1908. I have been on a farm all my life, you might say; was born and raised there, and spent my vacations on the farm during my college course.

At college I majored in Animal Husbandry, taking agriculture, soils, horticulture, and different things that went with it. Agronomy is the study of crops, especially cereal crops, grasses and also includes soils. While I was at the State Training School at Chehalis, I had direct charge of everything in connection with agriculture there; we put out an orchard of several acres which I personally superintended the planting of, and cared for, for nearly three years. I have had no practical experience in the matter of fruit orchards other than that.

About the middle of June, 1914, I made a visit to an orchard tract located near Wilbur in Douglas County, at the request of Mr. McCroskey, in company with Mr. Chapin, county agriculturist of Marion County. Our main purpose on this trip was a trip south to investigate lime quarries, and at Mr. McCroskey's request, we made the date coincide so I could stop off and look at the tract of land there to see whether or not the soil was suited for orchard purposes.

I think the plat handed me, plaintiff's exhibit 6, is the same plat I have seen before. We examined

(Testimony of F. W. Rader.)

tracts 19, 18 and 17 in this plat and found a very poorly kept orchard, or supposed to be an orchard on those lots. As we entered, if I remember my direction, it was on the west. Plat No. 19 next the road, 18 and 17 in the distance. The first thing I noticed was a lot of swamp grass farmers call rush, on plat 19, about three feet high. Wire grass is the common name of it. This land had evidently been plowed too dry to take the water off of it; had been plowed throwing the dirt up to the trees, leavy very deep dead furrows in the center between these rows of trees. The ground looked as though it hadn't been plowed or cared for for a couple of years and was covered with weeds; evidently plowed wet; few trees on real high spots; number of trees apparently dead. The ground seemed to be poorer over in 17 than the one next the road. 19 and 17 lay a little bit higher than 18; I wouldn't think there would be very much fall to the land. This would have quite an effect on the under drainage as well as the surface drainage. In surface drainage it would help get rid of the excess flow of water, so the water wouldn't back up and stand on it. Under drainage would have more chance to allow air to get in and open up the ground underneath so the soil would open up to a greater depth.

On the surface, I noticed a little difference where the land had been thrown up next to threes apparently putting what humus there was in the soil up on the ridges, showing the natural humus there was very shallow—that is the humus plant food, available plant food,

(Testimony of F. W. Rader.)

such as manure would be, rotted in the soil grass roots and things of that sort.

I would call this soil a very fine clay; it is generally termed by most people, adobe; some call it gumbo. Clay is one of the finest particles of soil. Generally we divide soil into gravel, sand, silt and clay; clay being the finest, void of humus, void of silt or sand. Then we have adobe soil of a plastic nature, like gumbo, and this soil, apparently the deeper you go, you go from what little humus there is on top down to adobe, going on down into gumbo.

This is a piece of land I would never pick out for an orchard. The soil is not deep enough; there is not enough available plant food there for the tree roots to go down and feed upon; there are tree roots feeding through these small hairs, fibres on the roots, and generally a tree will go down sufficiently, if the soil is so it can, until it will root good and deep. This land being very shallow, you naturally would not pick it out for an orchard.

A. No sir, I mean by shallow the available soil—soil that has available plant food in it.

In order for bacteria to live to make plant food available it must have air; also must be warmth and moisture. And you take a fine soil like that the air is practically shut out, and therefore, there is no plant food made available at this depth. No bacteria would live down in that soil to break up the particles that are dead there and make it available; therefore, your roots wouldn't live in that kind of soil.

(Testimony of F. W. Rader.)

You generally find a crop that is adapted to wet land; shallow root species, such as rye grasses, red top, and often find the Alsace Clover will grow on these shallow, wet lands.

From my examination of the soil I would say that it was not capable of absorbing moisture or draining the lands from the surface. The water that would fall on there in the natural course of rain would escape by surface drainage and flow off the top.

This soil is not capable of easy cultivation because of its fine nature. Those particles are so fine if you work it when it is wet, it will puddle; makes it like cement; also being so fine that way, when it dries it shrinks, and therefore bakes. In dry season it would be cracked open. When we were there, we didn't as I remember find any indication of it cracking, because the ground had been left in the rough from the plowing sometime previous.

I made no chemical analysis of the soil, but a physical analysis. Physical analysis is an examination with the eye or hand. You will note by feeling it in the fingers whether or not it is a sandy nature, or fine clay nature.

I wouldn't take that soil to be adapted to any fruits on account of the trees not being able to reach deep enough, and would consider it very poor orchard land.

I have had considerable experience in determining the value of this Willamette Valley land. The government conducts what they call a farm survey in which we take records of a farm actually what that farm pro-

(Testimony of F. W. Rader.)

duces in every phase of agriculture that is carried on in that particular place, finding out exactly what that place has produced, allowing a man a minimum rate of interest on the money invested, and thereby getting what his labor income is, and in that way we can tell just about what the land is producing and the value that should be placed on it. I have had experience along this line and from this experience I wouldn't place the value of that land over \$50 per acre. I base my conclusion upon the number of records that we have taken and that I have helped take of different crops grown on them and what this land would be adapted to.

(In taking these records we consulted with the farmers. The bigger percent of the farmers will tell you that the land prices are so high that they are unable to make ends meet, charging interest on that value. The bigger percent of the farmers as a rule, do not keep tract of their expenses in book form, but they have a very accurate record in mind on most all of these different projects carried on, on the farm.

### CROSS EXAMINATION.

Q. You didn't take into consideration at all, what the market value of that and other lands similar to it was, at the time it was sold in 1910, did you?

A. I don't know anything about the prices.

We had a shovel and mattock and examined the soil to a depth of about two and a half feet on all three plots. We made two on 17, two on 18 and one on 19, as I

(Testimony of F. W. Rader.)

remember it. I took it to Eugene. I didn't make a chemical analysis of it. The only examination I gave it was the naked eye and touch.

This soil would not be easily drained by surface drainage, because that type will cement and sort of run together and will only take up top water. An open drainage ditch in a year or two will cement together and practically no water at all will come in through the sides of the ditch.

As I remember it there were two open ditches that went through this tract which I would take to be artificial; they drained a small area. With the ditches that I saw there, it would take quite a long time to wash so as to be deepened by the elements in the natural course of events in that country. Those ditches would cement and the water would run along without having any appreciable effect.

We spent close to an hour on all three of the tracts.

Italian and English Rye, Red Top in particular would grow there. Grain would grow there, but I wouldn't take it to be the best land for that at all.

I didn't see any rocks on no. 17 that I recall. On 17 I went, I presume, about half way to the south and then to the north side of the plat. If rocks had been scattered thickly all over that tract, I think I would have noticed it.

I am familiar with the growth of orchard trees and could tell from inspection what the growth had been for that particular season. At the season that I visited this tract—June, 1914, as I remember it, the trees ought

(Testimony of F. W. Rader.)

to have made considerable growth at that time. The fact is they had made a very small growth. The ground looked like it had been plowed possibly two years ago. It didn't look like it had been cultivated this spring at all. That would make a little bit of difference in the growth of the trees, but not much on that type of ground. Ordinarily trees would not grow just as well without being cultivated.

I noticed a tract of land planted to orchard, apples and other trees, northerly from those tracts, just across the twenty foot road. It was in very good condition. I didn't make an examination of the soil in the other plats across the road. As far as I know the soil was just the same as the soil I examined. The trees looked very good and that land was cultivated.

### RE DIRECT EXAMINATION.

With reference to the tract that was north, it was higher than the one I examined. This may have had a great deal of effect on the growth of it; the soil may be a great deal deeper there. Any one who is familiar with the soils in the Willamette Valley, or the Western Coast here, would know that the soils are very streaked. One area may be good, and just within a few yards will find the soil very poor, entirely different.

Q. Then as a rule, if the land is a little higher, or something that way, the land is more liable to be better quality than that which is lower?

A. Not apt to be deeper.

(Testimony of F. W. Rader.)

It would have quite a difference in drainage, in opening up the land underneath in allowing the air to go through.

This land would be greatly benefited by tiling after a number of years, if it were properly put in. It should be put down from three to four feet. I do not know just what your outlet is at this particular tract.

By tiling the land it would be improved mainly in aerating it out; making it so the soil would hold moisture; so it would also let the excess moisture out of it. Making the land frame up and deepen it so you would have plant food at a greater depth.

### EXAMINATION BY THE COURT.

I noticed the trees on this plat and they were in very poor condition. As I remember the growth was not half what it should have been. The pear trees as fillers in part of it as I remember were dying. The peach tree fillers that were in plat 17 I believe were very scrubby. I noticed a number of dead trees on the plat but didn't count them.

To neglect the cultivation of a young orchard for the first two or three years would have considerable effect on it ordinarily; it would stunt the growth for one thing and it would be hard to bring the trees out again, so it is important to have a young orchard cultivated, for the first two or three years. As a rule we consider it best to take a tree out and throw it away if it has been neglected and start over again as it is hard to restore them again.

(Testimony of T. E. McCroskey.)

**T. E. McCROSKEY**

Called on behalf of the plaintiff, testified as follows:

**DIRECT EXAMINATION.**

I reside at Eugene and am a general real estate broker. For the past twelve years I have been engaged in the sale and purchase of lands and during that time have had considerable experience in planting and caring for orchards. For five or six years I was in the employ of the Lower Yakima Irrigation Company and I had charge of their sales office in the home office, and the field men, and under my supervision came the planting and care of the orchards in that district, a district embracing sixteen thousand acres of irrigated land. I had the supervision of the planting of orchards there.

During the last year, I made a trip to Douglas County at the suggestion of Mr. Lundburg for the purpose of examining an orchard tract located near Wilbur. I made the first trip on May 20, 1914, with Mr. Lundburg, to examine Plat D of Roseburg Home Orchard Tracts and had with me a map or plat. One June 16, 1914, Mr. Rader, county agriculturist for Lane County, Mr. Chapin, county agriculturist for Marion County, and myself made the trip again.

The first trip was to inspect the condition of the three particular tracts there, 17, 18, and 19. We had the plat with us at the time.

On both trips we examined lots designated as 17, 18 and 19 to determine the condition of the soil and

(Testimony of T. E. McCroskey.)

the general condition. On the first trip we made Mr. Lundburg informed me as to which tracts we were on, and then we asked a man by the name of Green who lives near Wilbur in the same general plat, and he verified Mr. Lundburg's statements as to what the tracts were.

The soil conditions there are very close texture clay. It was uncultivated and quite rough. It had been plowed towards the tree rows.

My purpose in making the second trip was primarily to show Mr. Rader and Mr. Chapin the tracts, at the request of Mr. Lundburg. We entered the general plat from the main roadway on the west of the plat and went directly to plat 17; that tract seems to have been cultivated since the other two tracts inasmuch as the vegetation is not so heavy on it and showed a state of cultivation later than the other tracts; but we made two examinations of the soil on tract 17 and found it heavy clay soil. On one examination we dug possibly eighteen inches, or two feet and the other place we went down about two and a half feet. Between 17 and 18, as nearly as I remember there is a waterway—I don't know whether artificial or not—and along that is growing ash brush from eight to ten feet high across the tract. Then there is another waterway on tract 19, beginning with this north line and running practically two thirds of the way across the tract. Evidently on account of the contour of the tract the ditch is discontinued there, and the water has flattened out and stood there. That is where there is possibly three quarters to an acre of swamp

(Testimony of T. E. McCroskey.)

grass, or wire grass. The vegetation, or the grass and the weeds on all the tract for that matter, was in bad condition and showed a poor state of cultivation. The trees on the tract, of course were not in good shape.

On tracts 18 and 19 we found apple trees set with pear fillers, and both the apples and the pears were dead and dying, a great many of them. On tract 17 were peach fillers and they were also in bad condition. They were not alone dead and dying but had curly leaf quite badly.

With reference to drainage, it would naturally drain poorly on account of its being so level—it was practically level and especially so on the south side of the tracts.

I wouldn't consider the soil an orchard soil for the reason that it is in such a condition that plant life, as far as orchard products, could hardly subsist and make a luxuriant growth. Crops would be poor; that is owing to the close texture of the soil and its poor drainage.

In digging for the soil and subsoil, we found the decayed vegetation was not deep; owing to the close texture it can't penetrate. It is near the surface, and root growth is poorest near the surface.

Soil of the nature that we found, growing a wire grass would be prejudicial for orchard purposes as it is indicative of wet land, and wet land is not conducive to the best growth for orchards.

The two smaller waterways that ran across the land were possibly two or two and a half feet deep. Two ditches went across the tracts; one, as I remember,

(Testimony of T. E. McCroskey.)

possibly half way across 19, running from the north to the south; that is the one to which I referred a moment ago as not running entirely across the tract; the other one was near the line between 17 and 18 as near as I could determine.

I noticed the tract north of 17 across the road and it is considerably higher, but we didn't make any examination of the soil; there are surface ditches on that entire tract, I believe, as far as I examined.

### CROSS EXAMINATION.

My last answer referred particularly to the tract north of 17. It is considerably higher than 17 and drains two ways; it seems that it is a little higher, possibly not directly in the center there, because it runs diagonally. I think the elevations run diagonally across the tract as I remember. I went on that tract just north of 17 but didn't make any examination of the soil; we were looking at the condition of the trees, which was poor I would say. They weren't as thrifty as they should be; there was too much water in the soil. I didn't dig into the soil.

Q. And you are basing your statement now of too much water on your trying to account for the appearance of the trees.

A. I think so.

In our examination of these tracts, we did not go down to bedrock or any rock. I went over 17 quite well

(Testimony of T. E. McCroskey.)

and did not see any rock on it as I remember. I think I would have seen the rock if it had been there.

I couldn't say how much higher the tract north of 17 is, than 18; the best estimate I could make would be that I think those waterways were made by the surplus water in the spring, and as a usual thing, water in soils of that texture, will not cut their way where there is a fall of less than four or five feet to the thousand.

Q. You say the southern end, then of the lot just north of 17 is twenty feet from the northern end of lot 17; there wouldn't be much difference in the two lots at those places.

A. No there wouldn't.

There is just a gentle rise; the entire plat is flat.

I know that the apple and pear trees died on that tract by the examination I made on both my first and last trip. Both trips were made in the same year, and the trees were then dying and dead, and the foliage showed lack of plant food.

The foliage on pear trees is entirely different in color from the peach trees, but it didn't show as rank or green as it should; some of it was dying; the foliage on the peach trees in quite a number of instances had curly leaf which indicates a germicide disease of the peach tree. This is not due to the soil.

I should think three quarters of an acre in tract 19 had the wire grass on it; there was a little on tract 18, not along the bank of the waterway I spoke of but near it. These places in 19 were at the end of the ditch or waterway where the water had come from that ditch

(Testimony of D. C. Pitzer.)

and spread out. The cutting of that ditch on through there would have removed all that if it had an outlet; it would assist it, at least. I did not examine in that vicinity to see whether an outlet could be found for the ditch across 19.

## D. C. PITZER

Called on behalf of the plaintiff, testified as follows:

I have resided in Portland for about a year and a half; prior to that time I lived in Umpqua Valley; I came there in 1875 and have been residing there most of the time since. Part of that time I was farming; part of the time gardening and fruit raising, and part of the time in the real estate business. I was in the fruit and garden business about twelve years; the orcharding was included in that time.

I am very familiar with the land and soils in the Umpqua Valley.

I am somewhat familiar with the orchard tracts in and around Wilbur and have been over lots 17, 18 and 19 in plat D Roseburg Home Orchard Tracts several times, showing it to parties that had purchased lands there, and even before the Harding Land Company got it into their hands, my partner and I had it for sale, in 1908, for something like a year, I think our time was up about the first of January, 1909. The Rices owned it at that time—two or three of them interested in it. It was listed with us for sale. We had it for

(Testimony of D. C. Pitzer.)

sale for \$30 an acre but did not make a sale on it. Plaintiff's exhibit C is a plat of the land.

### EXAMINATION BY THE COURT.

These three lots here are 17, 18 and 19 (indicating). Here is the road; this is the east of the road this is north; on this side it is comparatively level. A little higher, and in here is a low place. A low place running right down through this lot here, no. 4, east and west. Then there is a ditch cut right down through there. This used to be in timber; brush here and it was low, wet land all through here. No. 19 is a little bit of a knoll right here, and in here is a low swale coming down through 19. This land all slopes to the east; the whole business slopes to the east; runs up here, this is high mountains. All of the water comes off here hunts the low places, coming right down on these tracts here, and also right down on this tract here.

Court: You mean the water from the mountain comes down off 17, 18 and 19?

A. Comes down onto these so that it makes these tracts here—now it is a little bit higher again over in here. That is the northeast part. A little higher over in here, and the water naturally goes across on to these tracts here; these tracts being lower than these two here, the water from these, some of it, comes in here, and some of it goes over on these tracts—understand?

Defendant's Counsel: I would suggest saying these tracts would not get into the record at all.

(Testimony of D. C. Pitzer.)

Court: You mean the land is higher over——

A. A little bit higher.

Court: That is on 11, 12, 10 and 13, 9 and 4, than it is on 17, 18 and 19, and the water drains through 17, 18 and 19?

A. Yes, the water drains right away and it is lower on 4 and 5 than it is on 11, 10, 12 and 13.

Court: The water that drains north——

A. It goes off this part, off in here, and goes down in here, goes down across the road here.

Court: Oh, it doesn't go down to 17 and 19?

A. That is, the water goes all off of here down here and runs here.

Court: He is referring to lot 40 and the rest off there.

A. Yes 40, and this one here; 39 and 40. Naturally goes into this low place that runs through 19, here.

Part of this land was used for farm, raised wheat and oats, and this up in here had some timothy on it and red top grass; all along through here cheat grass.

Court: Cheat grass and red top here, 19 and 18?

A. Yes, and along through here.

Court: 17 and 18 and 19 and south of there.

A. Now, here was grain in here, and that was in brush here.

Court: Grain in 9, 10, 11, 12, 13 and 14.

A. And again over in here; had been farmed over in there; this here was growed up to what is called cheat grass and red top, all this in here. When we had it for sale as a ranch.

(Testimony of D. C. Pitzer.)

Court: What kind of wheat crops did it grow?

A. There wasn't any on it the year we had it at all; had been a year or two before that.

Court: Do you know anything about it before?

A. No, I don't know; there was no wheat crop on it the year we had it at all.

### DIRECT EXAMINATION CONTINUED.

Referring to Plat and Tract D, I think some on the west of the road that runs through to Stevens is suitable for orchard purposes.

I have not examined the soil particularly; it is what I would call free soil. It is not the same soil as that down on the level covering these same tracts; it is a soil that is easier to work. On 17, 18 and 19 I would call it adobe soil. That is what is termed black sticky land hard to cultivate. You can hardly plow it; the plow won't scour; it won't slip off the plow. That is land that plows really the best when water is all over it. Then when the water goes off and it gets dry it is as hard as a rock. It is hard to cultivate it at any time of the year. You could plow it dry and go on it with clod mashers and big harrows and disks, etc., and you may cut it up and get it in some sort of condition, but it is a hard proposition.

From my observations of these tracts and those in controversy, 17, 18 and 19, the drainage is rather poor on account of the water coming off the other land down onto them, and they being much lower. A great deal

(Testimony of D. C. Pitzer.)

of the water that would come on top of these lots in controversy would have to escape by means of evaporation.

There are two or three reasons why I wouldn't consider tracts 17, 18 and 19 good orchard tracts. In my observations in the Umpqua Valley in traveling over the different localities, I have never been able to find a first class apple and peach orchard on land lying like that, and of that character of soil. Another reason is from the simple fact that the W. C. Harding Land Company had expert horticulturists, expert farmers a hold of Plat D and the simple fact that there isn't an orchard on 17, 18 and 19 looks to me like it wasn't very good fruit land. A great many of the trees died; it wouldn't raise apples and peaches.

I have known of one or two orchards that have been planted on similar lands; out east of Roseburg about 4 miles on land similar to this planted and cared for two or three years; the trees didn't do any good and they abandoned the proposition because they wouldn't grow. There is an orchard that is fifteen or sixteen years old, lying near Roseburg that is on similar land, especially part of it, that the trees are not doing much good. The apples are not very highly colored. There are Spitzenbergs, Newtons and Baldwins in this orchard, and they have been for some years well taken care of, and under the condition that they were in, first class orchard, first class fruit had to be sold at a reduced price on the market there at Roseburg. The fruit was pretty small.

From my experience in orcharding, young trees

(Testimony of D. C. Pitzer.)

planted on a plat and neglected or poorly taken care of during the first two or three years would be stunted and cause them to die. It takes a longer time to get results out of a stunted tree.

I have been all over the tracts known as Garden Valley a good many times. It is a different character of soil altogether. It is a sandy loam river bottom land, and biggest majority of it. There is some of that runs up into the lands that is a little elevated, but it is different land from this.

### CROSS EXAMINATION.

I call this land a black sticky mud, that we have down here in the Umpqua Valley and on this land in 18, 18 and 19.

I understand what we mean down in the Umpqua Valley by black sticky land. This land, Plat D, is the same character as what is called black sticky land.

I know the people personally that handled this land. Mr. Green is one and Mr. Wright is their horticulturist. Mr. Wright was considered an expert and drew expert salary. I had no reason to doubt him. He was one of the men I had in mind when I spoke of the experts of the Harding Land Company.

Himes & Oliver had charge of the orchard four miles east of Roseburg; I don't know who owned it. It is a 200 acre tract laying on the left hand side of the road about a mile and a half this side of Dixonville. It was planted and attempted to be cultivated there, and a

(Testimony of D. C. Pitzer.)

great portion of it they abandoned altogether as an orchard proposition. I don't know why but the trees didn't grow. I am not prepared to say whether or not that is due to the character of the soil or to the quality of the trees. It might be that thousands of fruit trees set out in the Umpqua Valley died because of defects in the trees themselves.

I don't know whether the trees on this Himes & Oliver land died because they were that kind of trees. I only know they abandoned the operation. The orchard business too took a kind of slump in 1910; that might have been one of the reasons; don't know. They didn't abandon all this orchard. There was a part of it that lay on higher land there, they have taken good care of, and it is growing. It was on the same tract. I think they were all apple trees.

I couldn't say whether the slump in the orchard proposition discouraged them from replanting those that died. It seems as though the demand for orchard lands has tremendously decreased in the last year or two. In 1910 it was very good.

I spoke of another orchard, but I forget the man's name that owns it. An orchard just across the road from the fair ground, north. The west half of that orchard is very low, wet land.

The man that owns it had been there two or three years and he took extraordinary good care of it, and some of his trees up in the higher land, east of his house, had very nice apples, but around the low wet place his apples were very poor and very poorly colored and were

(Testimony of D. P. McKay.)

small. He had Spitzenbergs, Newtons and Baldwins, all apples.

I don't know whether or not a fruit orchard man in the Umpqua Valley will plant apple trees on black sticky land. Some small patches of black sticky land have been planted recently to apples. If I were a real estate man and offering a man a piece of land as fruit land, and the land was black sticky land, I would not advise him to plant apple trees on it; if he were going to plant fruit trees I would tell him to plant pears.

With reference to the orchard north of the fair grounds, I do not know whether or not the bedrock comes right up near the top of the ground on which the trees didn't do well; I never investigated that; I know wet land, I have been on the land; I know black sticky land and wet land and I know the trees didn't grow very well; I didn't investigate the bedrock at all.

#### D. P. McKAY

A witness on behalf of the defendant, testified as follows:

#### DIRECT EXAMINATION.

I have been a farmer and am in the general merchandise business at present, and have been about ten years, and I was always before that a farmer.

With reference to this Plat D, I lived on the farm two years, in 1886 and 1887; I farmed 250 acres of the land; it is the same land that is also known as the Jack

(Testimony of D. P. McKay.)

Chenowith place, and contained somewhere near 490 acres. I have been deputy assessor there.

The hill land all lies south of the road running through the place, and the bottom land all lies east of the road. Roughly speaking there must be 250 acres of land that could be farmed and the rest of it would be hill land. That outside of the 250 acres we never considered for cultivation. Some of the hill is pretty high and some of it has got timber on it; pretty good grass land, some of it. The 250 acres would include the fringe of land along the road on the left, and that other land platted on the right.

I farmed 17 and 18 since it was platted; I never farmed 19. We used 19 for pasture. There was nothing in the soil of 19 that would have prevented us from farming it, had we so desired.

I farmed 17 and 18 two seasons. We raised wheat one season and oats one season and had good crops both years. The soil on 17 and 18 was good soil, produced good grain and cultivates easy. It is free soil, nice soil to cultivate. It is not what would be termed black soil; it is kind of gravel loamy free soil. It is soil that cultivates very nicely. There is no part of 17 or 18 that could be called swale land; we never had any grain bowed down on it.

Referring to plaintiff's exhibit C, the plat, there is a ditch between or about on the line between 17 and 18 and 19, about 2 feet deep. I went to all the corner stakes all around all of these lots and located every stake, every corner, and between 18 and 19 there is a

(Testimony of D. P. McKay.)

ditch about 2 feet deep and it is made a little bit in this shape, and there is another ditch over here near the road. Now, on 19 there is a little kind of a low place here, but it slopes up next to the fence; a little hill makes around here a little slope; this ditch starts here and goes off a little this way and this goes off down into the main swale.

### EXAMINATION BY THE COURT.

Q. Mark these ditches will you please; take your pencil and mark the ditches where they are?

Well it starts up there say toward the northerly boundary of lot 19 and you go southeasterly direction and down into the other lot below of course and apparently a little in that direction and empties into the swale.

### DIRECT EXAMINATION CONTINUED.

I don't know of any ditch in 19 which is brought to a stop and doesn't provide for carrying the water off. If there is such a ditch I would certainly have seen it.

On 17 there isn't any ditch that interferes with the lot at all. On the east corner here, there is a little low place right there, but it doesn't hurt the lot at all. It isn't a natural ditch or slough or anything of that kind. It is just a kind of a low drain. There is a ditch, you know, goes down all the way, a deep ditch; drains the country above and comes down here; has been there for

(Testimony of D. P. McKay.)

years; it was there when I lived on the place. I have been down in the ditch; it is as deep as I am in places. Now this soil is the same as 17 and 18 all the way down and you strike a kind of clay and gravel down here, and goes on down into the creek that empties and drains the country above; and there is no ditch at all in 17 aside from this little drain right here, and that has no water standing in it at all; if this creek here, that comes down would get full and run over, why, it would be like any other low place; it would run through that low place right there for a little while; as soon as that would go down there would be no water on 17 at all; I never saw any water stand on 17; 18 and 19—we had a snow—one year while I lived on the place, the biggest snow I ever saw, 20 inches deep, and when it melted and went away, we didn't have any water standing there.

There is no ditch on 18 excepting the dead furrow between 18 and 19. That answers for drainage of 18 and 19.

Q. While speaking about drainage Mr. McKay, see if you can explain to the Court the lay of these lots. For example, compare lots 17, 18 and 19 with the adjoining lots, 12, 13 and 14. Show the Court how the land lays there, with reference to slope, etc.

A. Well, this is a very pretty valley from the swale down here all the way up, and it has just got a little slope all the way. There is no difference in 17, 18 and 19 from those above this road. Across this valley here, or bottom, any more than the natural slope. Of course it would naturally be a little bit higher but no

(Testimony of D. P. McKay.)

higher than just like this floor if one end is raised just a little. Lot 11 is naturally a little bit higher than lot 19, but 19 with your natural eye to look at them, have both got a slope; comparatively on the level alike.

The map shows between the two tiers of lots, 12, 13 and 14 on one side, and 19, 18 and 17 on the other, a road, which I have been on. going along that road, on either side there is just a natural slope; it all looks alike; it looks level just looking at these lots. To realize the slope you would have to take a larger view of the valley, but go down here to the lower end somewhere and look that way, would be the best way to get at it.

It would be a correct description of these six lots to say that it is a level tract of land.

The top soil where we farmed, is about 18 or 20 inches deep. I don't know how deep the subsoil is. I never struck bottom in it. The ditch that drains in the immediate vicinity of 17 is 6 or 7 feet deep. As far as it goes down it doesn't show hard pan or joint clay; it just looks natural to me; of course, I am no fruit man, no soil man, any more than the natural farmer, but the soil is just natural like any other soil with good soil on top and you strike subsoil of clay and it goes right on down as deep as that ditch is washed out and has kind of gravel and sand in the bottom of that ditch. The subsoil will drain all right; the land is porous enough to soak the water through all right. As to the top soil the water won't stand continuously right in one hole but will soak down. In my experience with the land we never had any trouble with it whatever.

(Testimony of D. P. McKay.)

I am acquainted with a class of land in the Umpqua Valley which is called black sticky land and sometimes black mud. Of this land that I plowed in 17 and 18 there is no land that can be said to be of that character. I have no reason to believe that there is any of that kind on 19. When I farmed the land I found the surface drainage sufficient to leave the land in proper condition for raising grain. I never saw any cracks in the land in the summer time. I have never at any time seen any cracks in it.

The quality of the soil is above the average in that locality. That farm was always considered a good farm and it is above the average.

I acted as deputy county assessor for two years. The market value of that land at that time was all the way from \$150 to \$300. That would be about 1910, 1911, 1912 and all along there. It is hard to tell what it is worth today as there isn't so much real estate changing hands now. Market values have taken a slump in the last two years and this applies to orchard lands too. Two years ago some land was being sold and pretty good prices being paid, I think as much as \$250 per acre, perhaps for that class of land here, two years ago; but I have heard all kinds of prices talked, and I don't know that I would be capable of saying just what the market value would be at that time.

I passed by there a number of times in 1911 and 1912 and observed the fruit trees; they looked very nice for young trees.

When we were out there the other day the tracts on

(Testimony of D. P. McKay.)

the opposite side of the road as we crossed the field looked very well; the trees were growing nicely. Most of the tracts were cultivated, corn between the trees, and they haven't been cared for as they should. Some grass growing around the trees, buty they made a good growth. Some of them had apples on and the orchards looked well.

Q. Now, is there any difference between the soil on which those trees were growing that you just now spoke of, and the soil on 17, 18 and 19.

A. Well, the lot, 17 and 18, I have plowed right through the bottom all the way, before there were any fruit trees there; I never could see the difference in the soil where 17 is and the lot right across the road from 17, never could.

In fact, before platting and making the road out there, there was nothing to mark the transition from land which is now on the left hand to land which is now on the right hand.

When I farmed the land 17 and 18 produced just as well as this other land we are just talking about—19 I never plowed.

### EXAMINATION BY THE COURT.

The yield was about 25 bushels of wheat and on the average about 40 bushels of oats. On any good farming land you will get more bushels of oats per acre. (It might be true that you can raise oats on some land successfully that you can't raise wheat on it, I don't

(Testimony of D. P. McKay.)

know. As to the necessity of plowing this land when it was very wet, I would agree to that because I think there has been too much of that kind of farming done. If you plow the land when it is very wet, it is apt to bake and be hard to pulverize; more so than if you plow it when it is in good condition to plow.

### DIRECT EXAMINATION CONTINUED.

I never saw any part of 17, 18 and 19 overflowed with water. When I was there the other day there seemed to be grass and weeds and some wild oats, some tame oats, some timothy, some clover. On 17 there was a very heavy crop of volunteer stuff of different kind. Would have made good hay if it had been cut. It was wild oats and grasses of different kinds. I saw quite a bit of timothy. It was a rank growth about waist high to me and I am pretty tall.

I have plowed 17 twice and I have never found any rocks on it yet and didn't find any when I was there the other day. On 18 I never found any; 19 of course, I never plowed, but I have been over it a number of times, riding horseback, and I never saw any rock on it, without it was under the ground, none on top. The ditches on the land did not expose any rock, boulders or anything of that kind.

### CROSS EXAMINATION.

I had no trouble with the bottom land as to drainage; it drained easily. In farming bottom land, when

(Testimony of A. L. Kitchen.)

we get through harrowing we would always open up a dead furrow toward the way it was plowed so if we had a heavy storm of any kind the water would have a chance to go right on out. There is plenty of fall there for it to drain all right, but if we leave it all banked up there with loose dirt in this low place, of course, it would naturally be a little lower where the dead furrow was; that goes out so slow it may kill some grain before it goes through, so we just run a light furrow there, that wouldn't be hard to get over with a header. That is all the drainage we ever did. The soil would permit the water seeping through it. We had no trouble with that bottom land as to water standing in puddles or draining out in that way.

Q. What do you mean when you use the word "Porous"?

A. I mean there is a kind of clay in the Umpqua Valley, back mud, or blue mud, that the water—we use to have a saying that the water would stand all winter in a horse track in some kind of soil.

Excused.

#### A. L. KITCHIN

A witness on behalf of the defendant, testified as follows:

I am manager of the Umpqua Valley Fruit Union, which is a co-operative organization of the fruit growers of the valley.

I have had about twelve or thirteen years experience

(Testimony of A. L. Kitchin.)

in the nursery business. I had experience in planting orchards both in Jackson and Douglas Counties.

I am acquainted with the land platted by the Harding Land Co. near Wilbur, known as Plat D. I have known that land practically ever since I have lived in Douglas County—the last seven years at least. I pass by there in going to my orchard. In doing so, I have noticed fruit trees on the bottom land there; those on the cultivated land have always shown thrifty growth, while those on land that has been neglected for the last two or three years don't show so much growth.

I have made a careful inspection of the lots on that tract known as 17, 18 and 19. I can't give the date, but I believe about ten days ago. At that time there was growing there a number of different kinds of grain and weeds of all kind. Some grain as high as my head and various kinds of grasses. There was alfalfa, and red clover I noticed particularly and timothy growing and bearing fruit. We passed all over three lots and in our observation there, while we didn't go over every tree, I only found one dead apple tree. The pear trees and apple trees that we examined were all alive with the exception of this one. Quite a number of the peach trees were dead but some were alive too. Quite a number bearing peaches at that time. We ate some of the paches off of the trees. I am confining myself to lots 17, 18 and 19. Newtowns were the only variety of apple I saw there—Newtown Pippin that was bearing.

I examined the trees to see if they had made any growth. They hadn't made much growth this last year

(Testimony of A. L. Kitchin.)

but had apparently made a fairly good growth the year before. A great many of the limbs had grown from two to three feet last year. It was perhaps that many inches for this year. Of course, this has been an extremely dry year in Douglas County, and I guess all over Oregon, and there had been no cultivation of the ground. The weeds and grass and grain had grown up around the trees and taken up all the moisture so that there was no opportunity for the trees to grow.

Across the road lying immediately to the north the trees were growing in good thrifty condition. The cultivation had been fairly good on those.

The soil across the road and on lots 17, 18 and 19 was identical so far as I could observe. There is no *preceptible* difference in altitude, or slope between one side of the road and the other.

We dug down in the bottom of the ditches to see if there was any apparent difference in the soil there, and while there was of course, as we went down in the ground a little difference in the texture of the soil, it was practically the same soil. A little lighter in color as we went down. The top soil was something like 18 or 20 inches deep; I didn't notice exactly. The difference between the top and subsoil is very slight; just a little lighter colored. We looked especially for hard pan or joint clay but found nothing of the kind, and found nothing that could be said to be impervious to water.

I am familiar with the land in the Umpqua Valley sometimes called black sticky land and sometimes black

(Testimony of A. L. Kitchin.)

mud. I didn't see any of that character of soil on lots 17, 18 and 19. I wouldn't say that there positively was not any of that character on any of those, but our examination didn't reveal any land of that character at all.

I have never seen a rock on any of that land as big as a hen's egg. I saw a little bit of fine gravel at the bottom along the ditches where we examined, but no rock.

I heard the testimony of D. C. Pitzer in court yesterday afternoon, and remember his referring to two tracts of land, one 4 miles east of Roseburg under the care of Himes & Oliver, the real estate agents and another tract opposite the fair grounds near Roseburg. I know these tracts of land.

The Himes & Oliver tract is real black mud, a good part of it. The land was planted under my direction. I sold Mr. Hopkins the trees and he told me to see that the care-taker had proper instructions about planting, and I instructed him also about pruning the trees; told him to cut them off about knee high after they were planted. Instead of that he just topped them a little bit, and left them about three or four feet high. I went out there and looked the ground over, the land, the orchard part, and observed they were not cut down low enough and I told him that they should be cut lower. He said he would do it. I went out again in June of the same year and he had just then cut them down. This first time I was there in April, and he had just cut them down about the middle of June. The result was he had cut off all the growth of the tree and

(Testimony of A. L. Kitchin.)

the trees died, simply because they had been cut off in the middle of the summer. The death of those trees was not due in any manner to the character of the soil.

The tract opposite the fair grounds has never produced a profitable crop for the reason that the bedrock is too near the surface, varying in depth from six inches and I don't think that soil is a foot and a half deep anywhere until you strike the bedrock on that tract. This explains the failure of that orchard. What little soil there is in the orchard is black mud.

Across the road the foliage was on the trees and they looked thrifty and green. The grasshoppers tackled 17, 18 and 19 and didn't get away with these others, because of the grass and weeds that were there to protect them.

Previous to this time I had often noticed particularly the foliage on the trees in this bottom land of the same character as 17, 18 and 19 and they were green and thrifty; if there had been too much water there it would have had the effect of turning the foliage yellow.

#### RE-DIRECT EXAMINATION.

It is the custom in Douglas County to plant orchards on bottom land because we consider it much the best land and it is generally understood that peaches thrive better on poorer soil.

(Testimony of R. W. Hinckley.)

## EXAMINATION BY THE COURT.

Peaches thrive better on poorer soil than apples is my experience. That is also the universal experience in Douglas County. I haven't the dates when these three lots were planted in trees but it was about five years ago. I was over them a number of times the first two or three years after they were planted, consulting with Mr. Green who was the care-taker for the first two or three years, and they were well cared for and made a satisfactory growth during that time.

### R. W. HINCKLEY

A witness on behalf of the defendants, testified as follows:

I live about 6½ miles from Roseburg in what is known as Garden Valley; at the present time I am developing some orchard land there that I own myself. I have lived in Oregon since May, 1908; I was connected with the Harding Land Company from November, 1908, until about September, 1909, when Mr. Harding and myself bought a tract of land in Garden Valley and sub-divided it, and sold part of it. I was acting as a sales agent and doing work in the office. I had no stock or any connection of that sort with the company and was working on a commission.

I know Mr. Hart and met Mrs. Peterson but once on a visit that she made to Roseburg to see the land; I went out with her at the time. I never met Mrs. Hart.

(Testimony of R. W. Hinckley.)

This was in May, 1913. I am the gentlemen referred to by Mrs. Peterson as Mr. Kinckley who had gone with her to lot 17. I omitted saying that the Harding Land Company again employed me from September, 1912, until July, 1913. I was then secretary and treasurer of the company and went in at the time Mr. Wallace left the company. It was during this time that Mrs. Peterson went to Roseburg.

Mr. and Mrs. Peterson both visited the land, and I took them out in an auto. At that time the tract looked to me as though it had just been disked; gone over with a disk presumably and the dirt had been thrown towards the trees a little and had a little rough appearance. Very few weeds on it at that time and the cultivation was such as in the orchards generally at that time of year. In the cultivation of orchards after using the disk I have always gone over with the harrow. The fact that there were some clods would not necessarily indicate a lack of care at that time.

The apple trees looked to me about as good as the average apple trees at that time. The peach trees were not as well and the pear trees had just been put in I think the year before. There were a few pear trees that had been re-set, put in where the peach trees were. They appeared to me to be about the regular size tree of that age. The trees were always pruned during the winter and this was May, and they naturally would not have made their full growth for that year. They were cut back quite severely in the winter time so there

(Testimony of R. W. Hinckley.)

wouldn't be much old growth left there from the previous year.

The practice as to pruning varies. The first years when trees are set out they were whip trees; we always set them four to six feet long, and cut them back at the end of the year eighteen inches; when they are set out that spring or the first of the second year, they will vary. Some of them cut back as close as 12 inches of where it was cut off the first year.

Assuming that these trees on lot 17 had been planted in February or March, 1911, I think they showed as much growth as they ought to have shown during that time taking the pruning into consideration.

Mrs. Peterson didn't like the appearance of the orchard. She looked for larger trees and my recollection is that she spoke about some trees that were on another tract that I understand were a year older. She expected from what she told me, to see trees of that size. She also *tought* the ground a little rough.

I saw no rocks there except small gravel over towards the draw, in the southeast corner of 17; it was just small gravel that you would find in any of these dry runs along the creek. Most of the gravel was in the run. I think there was a little up on the bank, but nothing but what you would find anywhere along. I should judge the run was five feet deep; I didn't measure it. There was nothing in the nature of stone or rock boulder on the surface of 17 where we went and Mrs. Peterson did not mention it to me, or claim the land was rocky.

(Testimony of R. W. Hinckley.)

After we had examined this lot I heard part of the conversation at least, had between Mr. and Mrs. Peterson and Mr. Harding. It was held in the office of the Harding Land Company I think the following day. The substance of it was that we agreed to plant pear trees in place of the peach trees on the tract the following winter, and we gave her a written statement. I believe they left the office and we were to write out this statement, and Mr. Peterson came back and I gave it to him. Mrs. Peterson was there and heard and understood what was said about settlement. I wrote out the memorandum; I won't say whether Mr. Harding dictated it to me, or whether I wrote it out myself, but I wrote in on the typewriter myself. I don't know whether that was introduced here in evidence yesterday as I didn't see that statement introduced. The agreement I wrote out was the agreement that I heard talked there among them. I understand that Mr. and Mrs. Peterson accepted it as satisfactory as nothing was said otherwise.

I heard no conversation between Mr. Glenn D. Hart and Mrs. Harding about these other two lots, 18 and 19, that I remember, other than regarding the cultivation. That was during the winter sometime of 1912-1913 in the office of the Harding Land Company before Mr. Harding, Mr. Hart and myself. As I understood it, the Harding Land Company's time for cultivating that land was up with the season of 1912, and Mr. Harding and Mr. Covalho had made some arrangements for the cultivation in 1913, and Mr. Hart asked me to write

(Testimony of R. W. Hinckley.)

out a contract between him and Mr. Covalho for the cultivation during 1913, which I did. The cultivation was to be at Mr. Hart's expense, and the contract covered lots 18 and 19 in Plat D. Mr. Hart made no complaint at that time that I heard. He requested Mr. Harding or I to sign the contract with Mr. Covalho for him, because he was going to leave at that time, or that night. It was written out, and Mr. Covalho signed it, and I think Mr. Harding also signed if for Mr. Hart.

Q. Now with reference to the Peterson matter, I hand you Defendant's exhibit 28 and ask you if that is the writing you referred to as having been prepared by you with the typewriter.

A. Yes, I think this is the one.

### CROSS EXAMINATION.

If the Peterson tract had been planted in the fall of 1910, there would be the summers of 1911, 1912 and 1913 for the Harding Land Company to take care of it under their contract if it provided for three years cultivation of the trees.

I had some trees myself in the Garden Valley tract. At the time I was out on the Peterson tract, there wasn't a great deal of difference in the growth and appearance of the trees on tract 17 and those in Garden Valley that had grown an equal length of time.

### RE-DIRECT EXAMINATION.

There are more or less trees on any of the tracts that will die during the winter, and naturally we will

(Testimony of E. P. Drew.)

replant them the next year, and there are always some small trees every winter. On my five years orchard, I am even replenishing last winter, and I will have to this coming winter, a few trees, not many.

(Excused.)

### E. P. DREW

A witness on behalf of the defendants, testified as follows:

I have been a nursery man for 34 years. I have had experience in Cuyahoga, Ohio, and Douglas County, Oregon. Have been in the nursery business in Douglas County for fourteen years. I have had experience in examining soil and determining its adaptability for fruit trees. My experience in handling soils would cover 33, or 34 years.

I was county fruit inspector of Douglas County. There has been a regular boom along fruit lines, and planting orchards there three or four years ago; I think it was about at its prime in 1910 but it is very poor now.

I am acquainted with a tract of land located near Wilbur platted by the Harding Land Company and known as Plat D. I was first over the land in 1905 and have passed it a good many times and made a special examination on September 15th last, at your request.

I examined the top soil of 19, took a sample an inch deep about the center, and took a sample of the subsoil. We made a general examination of the growth of the

(Testimony of E. P. Drew.)

trees, weeds and grasses on 19. We went almost to the south end of it, and we examined the ditch that run through it north and south almost to the center. It makes a connection with other water below the lots. We found wild grasses, wild oats, cheat, wild cheat, velvet grass, timothy, rib grass and some grass that we call horse-tail. It was exceedingly rank growth.

There is a slight change between 18 and 19; the soil is lighter but as far as the growth is concerned, it is practically the same. On 17 the soil is still lighter. It has some alluvial deposit on it, some silt which would make it a finer clay. I do not think that improves the soil for fruit growing. The growth on 17 as compared with 18 and 19 was practically the same; the varieties are pretty well mixed all over the three ten-acre lots.

There were apple trees growing there and some small pear trees, and a few peach trees. I am speaking now of all three lots. The trees were in a rather peculiar condition, according to a nurseryman, and a soilsman, or a plantsman. The trees ought to be dead; I couldn't understand why they were not; according to the care they had, they ought to have been dead, but they apparently were still hanging to life. They had no leaves, or practically none; it seemed as though the grasshoppers or something had eaten them off; at least the grasshoppers were still eating when I was there. I should judge the growth of this last year would average ten inches and it seemed to me the rate of growth ran about from 6 to 18 inches, of this year. I could tell from the nodes where it stopped growing last year.

(Testimony of E. P. Drew.)

I examined a few trees on each lot. I found one or two apple trees dead, and one or two pear trees; I didn't pay special attention to how many were missing. There were only a few peach trees that I could find, and some of those were dead. There seemed to be more on lot 17 than anywhere else.

The trees ought to have been dead on account of neglect and no cultivation. There are very few young trees that will stand two years in succession of no care whatever. The grass and weeds and one thing and another will sap the trees and they will die from lack of moisture and plant food. This would be the case even on the best soil.

This is a sample that was taken one inch below the surface in lot 19; that is the blackest one in the lot.

Said sample offered in evidence and marked Defendant's Exhibit 30.

There has been water added to that as it was dried out, and the water was added to show the color when wet.

This is a sample taken on lot 19 three feet below the surface, or the subsoil.

Said sample offered in evidence and marked defendant's exhibit 31.

That is what we call the dark clay loam.

This sample was taken from lot 19, about the center, one inch below the surface.

(Testimony of E. P. Drew.)

Said sample offered in evidence, and marked defendant's exhibit 32.

This was taken 2 feet 6 inches below the surface of lot 18, about the center of the lot.

Said sample offered in evidence, and marked defendants' exhibit 33.

This was taken from about the center of lot 17 one inch below the surface.

Said sample offered in evidence, and marked defendant's exhibit 34.

This sample was taken on about the center of lot 17 2 feet 6 inches below the surface, and is a sub soil sample.

Said sample offered in evidence and marked defendant's exhibit 35.

This sample was taken 4 feet 6 inches below the surface of lot 18; it was taken one foot below the bottom of a ditch that ran through 18, which was a little over three feet deep; I dug down a foot below the bottom of that ditch.

Said sample offered in evidence and marked defendant's exhibit 36.

There is no line that can be drawn between the top soil and the subsoil. It all depends upon the depth of the plowing, how deep the humus and vegetable matter

(Testimony of E. P. Drew.)

that is plowed under; if you plowed it four inches, then you only have four inches top soil; if you plowed it 18 inches you had 18 inches; it is a question I couldn't determine. This soil is just one general character all the way down, and I should think was at least eight feet deep.

Q. What was the deepest ditch you noticed on any part of the land?

A. This sample, four feet six inches, was the deepest I saw on the place.

These different samples, we designate black clay loam. I have worked in lots of that kind of soil. It is rather hard to cultivate and work unless it is done in the proper time. All soils are that way, except sandy soils and *gravelly* soils, and you must have regard to the weather conditions in cultivating. This soil is not as bad to work as some soil in that locality. I own similar soil to that and work it. This kind of soil has a tendency on apples to grow too much to wood growth; that is the only objection I have to it; but to the growth to apples, we consider this a little bit strong for apple growth.

Q. There is no objection to the soil as being poor, or barren or not rich?

A. The contrary.

There was no difference whatever between the ridges in the tree rows and those out in the center. It is natural to plow towards the trees, the first plowing, and the next plowing plow away. Of course, the first plowing, when you plow to the trees, makes a ridge in the tree

(Testimony of E. P. Drew.)

row. There is no other way to do it, if you plow to the tree row, because you work back again in order to make it level. When we made the examination the ground had been plowed without being worked back and was ridged around the tree row.

It is not true that all the productive top soil was thrown up into these ridges. That would not be possible on that kind of soil with ordinary plowing; it is ridiculous. I found top soil everywhere over the tract.

I am familiar with a soil in the Umpqua Valley called black sticky soil or black mud. There is none of this soil on lots 17, 18 and 19. When that black mud is dampened, it is as black as a cat you might say; I don't know anything that is blacker than that; that is as black as it possibly could be. It doesn't take an expert down in that country to know black mud when it is wet; the children know it.

There was no such thing as rock or stone on 17 that I could find. I looked especially to see if there were any rocks or boulders there.

I have visited a great many parts and parcels of soil in Douglas County for different people who wish to buy and some of these orchard tracts I have visited and examined for people who want to buy, to pick out a tract for them, and in that way it made me somewhat familiar with the market value at that time, in 1910, 1911 and 1912, and before that. I should say that the market value of these lands in 1910 was anywhere from \$200 to \$250 an acre; it is according to their locality. At this time it is considerably less. The bottom has

(Testimony of E. P. Drew.)

dropped out of the value of fruit lands. The slump began about 11½ years ago.

Lots 12, 13 and 14 as compared with 18, 17 and 19 are a little bit higher naturally because the flow is from north to south. The difference is so slight that it would take a trained eye to detect it. My impression in going between these two tiers of lots was that I was crossing a level tract of land.

I noticed an orchard growing on lots 12, 13 and 14 in fair condition. There were Newtown apple trees and I think I noticed Spitz too. Also quite a number of peach trees. The cultivation wasn't real good, could have been better. It is all practically the soil exactly as in 17, 18 and 19.

There is no physical interruption of the surface, or mark or break of any kind between these tiers, except the roadway and a few dead furrows.

This soil will absorb water; it takes a little longer than sandy soil or *gravelly* soil, but it percolates it all right. There is nothing in the soil anywhere beneath the surface there which would stop the absorption of water.

Q. From your experience in planting, could you form an estimate of the reasonable value, say per acre, of planting these tracts, 17, 18 and 19, to the kind of trees that are planted there, including, of course, the cost of the trees as well as of the planting, and the care for the first three years, leaving out of consideration any expense that might have been incurred for clearing the land before planting?

(Testimony of E. P. Drew.)

A. We have taken contracts for \$25.00 per acre for the first year; for planting it and taking care of it the first year; and ten to fifteen dollars the following two years, according to what is planted there, and how far apart. I mean per acre per year.

I have in mind a similar soil to this soil in these figures. I think that is about as low as you can get it.

Some of the trees on 17, 18 and 19 were over six feet; some would reach seven and a half; they were spindling however, and if they had been properly cut back, they should not have been over 5½ or 6 feet.

I could take these orchards on 17, 18 and 19 and still make successful orchards out of them.

I think the richness and quality of the soil on these lots for orchard purposes, is a little bit better than the average.

### CROSS EXAMINATION.

If the land had depth, I would say that if it produced an extraordinary good yield of wheat and oats, it was well adapted for orchard purposes. I should say that this land was adapted to both grains and orchards—that is, apples and pears, nothing else. I base this statement somewhat on the idea that the plant food that is contained in this soil is the same plant food that goes to nourish fruit trees and grains alike. The plant food contained in this soil that makes it particularly adapted for orchard purposes is humus principally, which is made up of decomposed vegetable matter.

(Testimony of E. P. Drew.)

When it is separated into its elements we have nitrogen, phosphorus potash and several others. I would consider this soil rich in those elements, which are necessary for the production of good fruit trees. They are not necessary in the same proportion for wheat and oats; they do not require as much nitrogen as fruit trees.

Alluvial deposit means star dust, for one thing, that falls from heaven, ground up rocks, decomposed quartz and all rocks ground up in a fine state; washed down by the water as silt; when organic or decomposed vegetable matter is mixed with that, it sometimes turns it into a clay, if there is enough of it present. That is what makes our clay. If it is purely alluvial, and purely decomposed vegetable matter, then it is a clay loam. These lots are made up of that kind of soil.

There is no question but that that soil, lying there year after year on practically a level tract and the water coming down over it, would absorb the water, permitting it to seep through. The longer it stood there the more it would absorb, because there would be more silt collected and deposited on these lots. If it wasn't cultivated it would have a tendency to pack pretty close.

Cement is a term that some people use that they have no right to use; cementing the land means something that after it is dried, it is as hard as a rock, but all of this soil, no matter how hard it is, or how much it is compressed, it can be shaved with a knife. That isn't quite as hard as a rock; I wouldn't call that cementing, but slicking over; the finer particles would stay in one place and the coarser would flow on with the

(Testimony of Walter Adair.)

water; it would have to have some lime and burn it to cement.

Soil could get in such shape that water wouldn't permeate it readily but this isn't that kind. It would have to be the next thing to solid rock and gumbo. Gumbo is worse than black mud. It is as much worse than black mud as black mud is worse than sand.

The soil samples I brought down were wet to show the color; that is the only purpose I had in bringing them in; they were absolutely dry when I took them, and a little lumpy.

The best time to cultivate that soil is when it is dry; from sometime in April to the last of August or first of September.

You can handle this particular soil and make it pulverize. I wouldn't plow it so wet; plow it in the falls, in the first place and let the winter rains work on it. Then I would plow it back in the spring when it got dry enough, which would be easily done where if it wasn't plowed in the fall, and was plowed in the spring, you would have to wait until it got too dry, which would make it lumpy.

WALTER ADAIR, A witness on behalf of the defendants, testified as follows:

I am one of the owners of the tract of land known as Plat D. I have lived in Oregon since the first of March, 1909.

(Testimony of Walter Adair.)

Mr. Epperly's occupation at this time is farming near Roseburg.

I knew Mr. Burns in Colorado for about 14 years. He is a farmer.

Mr. Green has always farmed since I have known him and he is tending trees now on this identical tract.

Mr. Wallace has been in the mercantile business, with the exception of the time he was in Colorado, ever since I have known him as a boy.

I have had about 30 years' experience farming.

I saw this Plat D, just to look at it, in January, 1909. I made a careful examination of it in July or August, 1909, with a view of buying it. A few days before this Mr. Green that I know of, went out there, and I was told Mr. Burns and Mr. Epperly were there but I wasn't with them.

I am not a horticulturist and know nothing about fruit trees, but I was on an orchard at that time, and I knew where my best trees were; knew what kind of land they grew on there, near Roseburg. I went out there to Wilbur and I saw the same kind of land where my choicest trees grew, and then I encouraged my son-in-law to go into it, because there is where our best trees were where I was living near Roseburg. That is all I knew about it. In purchasing this land, I honestly believed it was good fruit land or I wouldn't have gone into it.

I had this money, I didn't expect to use it, and I thought I would put it in there, and I thought it was a good thing. To show you why I thought so, I paid the

(Testimony of Walter Adair.)

same price as the rest of them did to the company, including myself, for ten acres of that land. That was after it was platted.

I think our deed called for 461 acres. Something over 300 acres were platted, but that was not all sold.

I have ridden over lots 17, 18 and 19 on a disk and walked over all three of them with a harrow. It is as easy land to cultivate as any of it at all, if you go just when you should, but if you wait until late in the spring before you do the plowing, then I would say it was harder than it would be on the bottom soil, that is river bottom, sandy soil.

What I have said about waiting too late in the spring would apply to any soils generally that I have worked.

I had experience for three years in the orchard business in Douglas County and took care of three orchards. I have worked several different localities in the Umpqua Valley.

The quality of soil in 17, 18 and 19, as far as making growth is concerned, will compare very favorably with other good soils in the country.

The ten acres of this land I kept, I gave a contract, just the same as any other party who bought land on this tract; the same as Mrs. Hart and Mrs. Peterson, with the Harding Land Co. excepting I paid so much an acre. I paid, according to my contract, \$200 an acre and took the bare land, and then myself planted the trees or had it done, and cultivated them, in place of Mr. Harding doing it.

(Testimony of Walter Adair.)

Mr. Green took two tracts at \$200 an acre, and entered into a contract with the Harding Land Company just the same as I did. We both have this land at this time.

I planted in the spring of 1910. My son-in-law did the work for me that year, and planted it to apples and peaches, and they have been cultivated every year since. I cultivated them all of one year and part of another myself; the rest of the time he has done it. My lot is No. 9 in Plat D.

I have a very good orchard. All the trees that are living are in a thrifty healthy condition. There are probably a dozen apple trees and more than that many peach trees that have died. That is not out of proportion to any young orchard that I have had anything to do with, but rather better than the average.

My lot lies directly opposite 14; 14 lies just between 9 and 17. The soil of 9 and 17 is practically the same, but the ones towards the road are blacker than the soil of 9, 14 and 17. Those three tracts are identically the same to work.

I have worked some of the soil in the Umpqua Valley known as black sticky soil or black mud. I never have worked any on these lots unless it is a little piece right down next to the house. I can't give the number of the lot, but it is none of the lots in question; is a long way from either one of them. I would not say there isn't a small place of that kind of black mud pretty well to the county road on 19; there may be half or quarter of an acre that is black mud; in crossing it I

(Testimony of Walter Adair.)

should say it was as wide as this room. I have crossed it with a disk and I took it to be that. It is a very small place, but if that would be plowed up once deep enough, I don't know that it would be different.

I shipped some Alberta peaches off my fruit land this year; it was not a very heavy crop but the peaches were very nice. I have never considered this land specially peach land since the first year.

I have plowed my land each year and then had it disked several times, harrowed, and dug around the trees with a shovel I think almost every year.

#### EXAMINATION BY THE COURT.

My trees were planted in 1910. We bought in August, 1909, and they were planted the next winter and spring, 1910; that would be January and February. I have nearly always every year dug around the trees with a shovel for probably a foot in circumference. They have been pruned each year.

#### DIRECT EXAMINATION CONTINUED.

The land on 17 and 9 is practically the same. 18 and 19 the first year outgrew mine; whether it was in the quality of the tree that was put out I don't know. I don't know when these three lots in question were put out to trees, only that it was sometime in February or March of that winter. I wasn't over at Wilbur at the time. They were planted somewhere near about the time mine were.

(Testimony of Walter Adair.)

That year and the next the cultivation on 18 and 19 was good and the trees looked very nice. I only know that they were disked; the ground between the tree rows was planted with hay and they worked up and down the trees about  $5\frac{1}{2}$  feet on each side of the tree with a disk and cultivator. I couldn't tell how often this was done during the season, but a number of times.

Eighteen and 19 were planted along about February, 1910.

Court: The contracts were made in March.

A. Then I am mistaken, I wasn't there.

Court: And 17 wasn't planted until the following year?

A. Not until the following year.

Court: That is my understanding.

#### DIRECT EXAMINATION CONTINUED.

The last time I was over lots 17, 18 and 19 was in the latter part of August of this year and picked my peaches. It was all grown up to weeds then and the trees hadn't been pruned; the leaves were pretty much all off the trees, which I accounted for by the grasshoppers in the tall grass. I don't know how many were dead trees; I know I was surprised and made the remark it was a wonder to me there were not more dead; a great many of them were alive and looked thrifty down at the root for not being pruned for two years.

I knew how land was selling in Douglas County in 1909 and 1910 and consider \$200 an acre for the bare

(Testimony of Walter Adair.)

land a fair price; they were asking more for some of the land. Now, irrespective of the trees, I presume land right close to town that way would bring \$100 to \$150 per acre.

Wilbur has probably 25 or 30 houses, a couple of stores, a blacksmith shop, a church, a schoolhouse and a depot. Also station of the Southern Pacific. The lower end of this land, out by the road must be close to half a mile from the depot.

We paid \$23,000.00 for this land or \$50 per acre for it all. From the price we got for 118 or 120 acres, it was worth \$5.00 an acre, and we thought we sold it fairly well, and some more of it at \$30.00.

## EXAMINATION BY THE COURT.

There were 461 acres in the tract; something like 118 or 120 acres hill land that we sold at \$5.00 per acre.

## DIRECT EXAMINATION CONTINUED.

If there had been any rocks on 17 I know I would have found them in driving across it; I know there is no rock on it. (I never dug down under in the soil there, only at one corner of it at the ditch. The depth is practically the same only it gets a little lighter; I should say it was 10 or 12 feet deep, and over at the edge on the other side it is deeper than that, that I can see.

The water penetrates this soil and goes off after a

(Testimony of Walter Adair.)

rain. There can't be anything there like hard pan or joint clay because the water soaks down after a rain.

I know there were some stumps over in the corner on lot 17, but I couldn't say whether there was half an acre, or an acre.

Q. Did you ever observe how many trees, if any, were omitted on account of this little tract not being cleared?

A. If I remembered rightly the trees were all put in.

I also owned a tract in Garden Valley and in the year 1911-1912 I practically took care of both tracts myself.

The best tracts, or my best trees on the Wilbur tract exceeded the best growth on the best trees of the Garden Valley tract by something like  $2\frac{1}{2}$  inches. I was keeping track of the best to see which was the best land. The Garden Valley soil is a bottom sandy soil; river bottom, we call it there.

### CROSS EXAMINATION.

The black muddy soil on 19 is down on the ditch, and I don't say that it is on 19; it is along that ditch there at 19 or 20, right in that neighborhood, and is a little spot that I took to be heavier than the rest.

Lot 9 is a little higher than lot 14, and lot 8 higher yet than 9. Beyond 8 it does not go into a hill, but there is a creek there on the east slope.

At the time we purchased this land we intended Mr.

(Testimony of W. E. St. John.)

Harding to plat it and sell it. W. C. Harding called our attention to it and first suggested it; he said he would plat it and could sell it for us.

W. E. ST. JOHN

A witness on behalf of the defendant, testified as follows:

#### DIRECT EXAMINATION.

I have lived at Sutherlin, Oregon, for five years; I am in the real estate business and am living on and developing an orchard tract of my own and some for others, which business I have been engaged in since my residence there. Sutherlin is about 4½ miles from the tract in controversy, which I am acquainted with.

I was formerly associated with the Luse Company which was formerly known as the Sutherlin Land & Water Company. This company have somewhere between three and four thousand acres platted and planted in Sutherlin Valley to orchards.

I am familiar with the expense of planting and caring for orchards in that vicinity. One day last week I inspected lots 17, 18 and 19 of Plat D. I am familiar in a general way with the soil of the Sutherlin Valley that has been planted so largely. It is practically the same soil as that in lots 18, 17 and 19. The land is all on the same creek or water stream.

I am familiar with the land in the Umpqua Valley

(Testimony of W. E. St. John.)

commonly known as black mud. The land in controversy is not of that nature.

We are selling similar lands, same character and situated practically the same from \$350 to \$500 an acre. That did not include the planting and care of the orchard. We charge \$35.00 an acre the first year for planting and \$12.50 per acre each year after that; that is, prepare the land, furnish the trees and plant them for \$35.00 an acre, and \$12.50 for taking care of it the first year. An ordinary charge in that vicinity for caring for an orchard the second year would be \$20.00 per acre.

Upon my visit to these lots in controversy a few days ago, I found apple and peach trees growing. There was fruit on a few of the peach trees.

Tracts 19 and 12, 18 and 13 and 17 and 14 are very similar; they have a gradual slope down in that direction.

The 400 acres that the Sutherlin Company has planted have made an excellent growth on very similar soil; they are almost in perfect condition.

Q. Now, you may state what the fact is about the market for fruit lands changing since 1910, or say 1912?

A. Well, we are selling, but there has been a market change.

It isn't a case of the price having depreciated so much, but just a question of not being able to turn the lands. 1910, of course, we all know, as a very prosperous year in all lines of business. Since then all dropped off and hasn't been for the last year any business to speak of, practically speaking. We commenced to

(Testimony of W. C. Harding.)

notice the change along the latter part of 1910; 1910 was good with us up until the winter time; we noticed it dropping just a trifle; 1911 held just about the same as the close of 1910, and in 1912 and 1913 dropped off just a trifle, but in the latter part of 1913 and 1914 we have done practically nothing.

### W. C. HARDING

A witness on behalf of defendants, testified as follows:

I am 51 years old and the president of the W. C. Harding Land Company. I have resided at Roseburg for about 6½ years. I have been selling fruit lands—planting them and caring for them and general real estate business as well. During that time our company has platted and planted in the neighborhood of 2500 acres.

The tracts in controversy were sold by Mr. Kendall in the spring of 1910 I believe. 18 and 19 were planted that year, I believe, or that spring, in March, and the other, lot 17 was planted the following year. There was some clearing to be done on it and we didn't get at it that year. Mr. Fred Green had the management of these tracts.

I believe Mr. Kendall saw this land before he sold it; he went to Roseburg for that purpose from the Portland office. Mr. Wallace attended to the planting in the main on Plat D in particular—the secretary of the company.

(Testimony of W. C. Harding.)

The tracts in controversy were planted by Mr. Green who was directed by an orchardist he got who had experience in California. After his planting was done that spring we furnished him a Mr. Phillips who came to us with splendid recommendations as an orchardist from Colorado, in and about Grand Junction, and he worked with and for Mr. Green that year. The trees were sprayed and pruned and generally cared for under his directions and was thoroughly done the first year, I know. I gave a good deal of more or less personal attention to it and was in and about the tracts quite often. I talked with Phillips about what the trees needed and the general care they were receiving. I don't remember much about the next year except this: I was up there in the fall of 1911 and at that time they looked good. During the spring of 1912 we had another man who I consider personally one of the best orchard men I ever had in Douglas County; a Mr. Geo. Wright, with a vast amount of experience and knowledge as well, who was on this tract and did the pruning and the spraying. I am speaking in general of that tract. I don't know about these three tracts any more than any of the rest of this entire Plat D, that we were caring for. He was there for probably three months, up in this general Plat D, with from one to two assistants all of that time, pruning and replanting in some instances, to my certain knowledge, whitewashing the trees. In other words, our directions to him were to do everything in his power to build an orchard. We know we had to turn them over to the ultimate owners that fall and winter.

(Testimony of W. C. Harding.)

I know the trees were replanted with every care in the world with good stock and that they were properly pruned and, as I said before, in many instances white-washed.

### EXAMINATION BY THE COURT.

That was in 1912 the last year we had them in charge. They were cultivated and cared for properly during the years 1910, 1911 and Mr. Wright's care there in 1912. The expert care that was necessary to give the trees at that time so far as the replacing with perfect stock on the tracts, and what care they needed as far as pruning, because at that time the trees were coming three years old, and the older the tree gets the more care should be directed possibly to the cutting of the limbs. It is during that summer, that was 1912, during that summer, Mr. Green gave the tracts good average care. I am speaking now of the general care in Plat D and I saw them during that summer or fall repeatedly.

### DIRECT EXAMINATION CONTINUED.

I am satisfied we had a good average orchard the first of October, 1912.

The next year in the fall, we had such an orchard ready and in proper shape to deliver to Mrs. Peterson except the replanting of the pear trees which we had promised her and didn't place during that winter, for the reason that this suit started during the planting sea-

(Testimony of W. C. Harding.)

son of this year and we didn't care to go ahead at our own expense, when we didn't know what the outcome was to be, as far as she was concerned.

At the time we planted these tracts, we did not know that they were not adapted to the growing of peaches and apparently no one else in the Umpqua Valley did. It was an experiment on the soil of that country, with the exception of the sandy river bottom lands, principally on the edges of the river. The peaches were planted as fillers. This was done to give a little income prior to the third or fourth year, or while waiting for the apple trees to come to bearing.

Ordinarily an apple orchard is supposed to be in full bearing at seven years, but very seldom is.

I never at any time authorized or directed any of my agents to discourage any of our prospective purchasers from personally examining the land offered for sale. In fact virtually everything in Garden Valley was sold after a personal inspection of it. There were a few tracts that were sold by correspondence, but I presume between 80 and 90 per cent were sold only after a personal inspection had been had of the land, and in every instance, we urged a personal inspection if it could be had.

I remember Mr. Hart being in Roseburg in January, 1911, but remember more about his being in the Portland office; I spent about half my time in Portland, dividing the time between Portland and Roseburg. I don't remember that I had a conversation with him about this tract at that time.

(Testimony of W. C. Harding.)

I remember Mr. Hart visiting the tract again in February, 1912. He was at Roseburg and we had a stockholders meeting of every stockholder of the Harding Land Company, that lasted about a week, and Mr. Hart was at Roseburg for a week or ten days and virtually everything of interest with regard to our orchard plantings both personal and from a company standpoint was discussed at that time. I didn't go to the land with him at that time that I remember. I don't remember any specific conversation that we had at that time excepting as I say the conversations in general.

I remember Mr. and Mrs. Hart's visit to Roseburg again in July, 1912. I do not think I visited their orchards with them at that time. I talked with them both while they were at Roseburg. We did not particularly discuss their own orchard tracts, only that they both expressed pleasure over the thought of quickly coming to the Umpqua Valley or Oregon, to live. I do not think either of them made any complaint to me at all about the condition of their orchard or the land on which it was planted at that time. I do not remember driving them to Garden Valley.

I heard the testimony of Mr. and Mrs. Hart to the effect that I promised at that time to sell the tracts near Wilbur and give them some land near Garden Valley. The fact is, I didn't make any such promise. Mr. Hart was our sales agent at that time. Our Roseburg office made very little effort in attempting to sell land. I personally made practically none. Furthermore, I couldn't have promised anything at Garden Valley be-

(Testimony of W. C. Harding.)

cause everything at Garden Valley had been sold for nearly three years, with the exception of the hills and some few tag ends that weren't worth while.

I heard the testimony of Mrs. Peterson about her visit to her tract, No. 17; she was not pleased with her orchard and said she looked for larger trees. I remember one statement she made that it didn't look as large as an orchard that her father at one time planted back east, but I suggested that possibly orchard methods might have changed in the last few years, and the question of pruning, and things of that kind, might have changed decidedly since that orchard back East was planted. We agreed with Mrs. Peterson to plant pear trees in place of the peach trees; in fact, give her a full planted pear orchard as well as apple orchard, with the suggestion that in the course of a number of years she could then make a choice between pears and apples. She and Mr. Peterson both assented to this. We gave her a letter which Mr. Hinckley who was then secretary of the Harding Land Company, and myself as president, both believed would act as a supplemental contract.

I did not visit Mrs. Peterson's land with her. I didn't at that time know the exact boundaries of her lot and the condition as to whether it was all cleared. I relied largely on her statements and that of her husband. They claimed that there was a good deal of unplanted land; in fact, quite a little uncleared land on the lot. I did not familiarize myself with this particular tract of land before it was offered for sale or planted to fruit. I relied upon the men whom we had caring

(Testimony of W. C. Harding.)

for the lands, and upon those gentlemen who acted as our experts in planting the trees and caring for them.

I understand that the land in controversy is referred to but I say that is the general habit of the Harding Land Company. These tracts in controversy we had Mr. Green plant, or under the direction of an orchard guide; in fact all three of them and all the plantings on the plat.

I don't remember that we had this investigated and passed on by experts before it was put on the market for sale, or that we sent off and got experts to come down there and testify as to the value of this land for orchard purposes. In the first place, I had ten years orchard experience myself in my younger days, and I thought I knew something about soils. In the second place, we took the judgment of men who had lived in the Umpqua Valley a number of years in virtually every purchase we made. In other words, were trying to get the best from the very start in our various plantings or those tracts that we considered adapted to the planting of orchards.

I do not think I stated to Mr. Kimball or Mr. Lundburg that these orchards had been neglected because they had not been neglected. I did not admit, or state to either of the gentlemen or to the plaintiff or her assignors that the land ought never to have been planted to fruit trees. Mr. Lundburg brought Mr. Kimball and upon visiting that tract I made the statement in regard to this probably twenty five or thirty acres along the railroad in this plat C at Deady, that it should have never

(Testimony of W. C. Harding.)

been planted to orchard. I remember that distinctly because it never had. We made an adjustment of that claim afterwards. We bought, or took the land back, but I never made this statement about these lands.

I know of no reason why the land in Plat D and particularly these three tracts in controversy should not have been planted to orchards.

Tracts in that plat have made an average growth I think, beyond question. I speak now of the apple trees because the peach trees did not do well.

We entered into a contract with Mr. and Mrs. Hart to replant their several tracts in pears. That is it was agreed to by Mr. Hart and I don't think Mrs. Hart had anything to do with that; I think that was the spring of 1910—I don't remember whether that was 1911—I would say 1911 undoubtedly—that was determined on. At any rate the pear trees were there when I saw the tract with Mr. Lundburg and Mr. Kimball in 1912. The pear trees had been planted where the peach trees had died out on the Hart tracts, 18 and 19.

The pear trees were planted at Mr. Hart's suggestion; it was a mutual agreement and Mrs. Hart did not make any objection to it.

I never said to Mr. Hart that God never intended that land for orchard land.

Mr. Hart after his election to the legislature, came to Oregon sometime the latter part of December, 1912. At that time I called his attention to the fact that our stewardship had virtually ceased and it would be up to him to care for his tract the next year. We had a

(Testimony of W. C. Harding.)

former discussion about this matter back in Dakota when I was there in September, 1912, and Mr. Hart authorized Mr. Hinckley and myself, as his agent, to go into contract with Mr. Cavalho. We suggested one of three men, Mr. Green, who had cared for the tract, Mr. Gray, who lives on one of the tracts down there and Mr. Covalho, and Mr. Hart chose Mr. Covalho, at possibly our suggestion. Covalho needed the work and was doing as good work as anyone. So he authorized us as his agent to go into contract with Covalho for the care of these tracts for 1913. I will explain another thing and I know of possibly one other company that follows the same rule, the Edenbower Orchard Company, that when October 1st comes, the season ends. By what rule we have that, I don't know, except that has been our custom six years and all our tracts have been turned over to the owners after October 1st of each year. Cultivation usually ceased about the first of August.

We entered into the contract with Mr. Covalho for Mr. Hart and he had charge of the orchards from that time on. This arrangement was not made because we were short of funds. It was because our time for caring for his orchard has expired. Mr. Hart claimed that a literal interpretation of his contract would place the time of our stewardship during March sometime, 1913, but we went into contract with Mr. Covalho during the early part of January of that winter, 1912, 1913.

I do not know how much of lot 17 was not cleared in May, 1913, as I was not there at that time. I have

(Testimony of W. C. Harding.)

not been over that lot frequently; I was over it a week or ten days ago. There is a clump of brush on part of the lot, possibly 50 feet square, I should think, and other than that I didn't see anything but what was in good shape. One of the photographs introduced here shows a large tree fallen; I think that is on one corner of the lot, right close to the edge of 17. It must be the northeast corner towards Deady. That clump of trees doesn't occupy as much space as in this room. There were no rocks or boulders on 17 that I noticed or saw.

The main conversation I had with Mr. Hart as to his getting further time on his payments was back at Deadwood, South Dakota, in September, 1912, at the time I was there for a week or ten days. Mr. Hart was very much worried because Mr. Eddy insisted on payment, Mr. Eddy being trustee as between the land owners and the lot owners; that is the original land owners—the Harding Land Company and the purchasers.

### EXAMINATION BY THE COURT.

That is Mr. Adair and his associates; in fact I had a conversation prior to this because Mr. Hart upon his spring visit, or upon one of his visits to Roseburg wouldn't go and see Mr. Eddy because he didn't want to tell him at that time that he was short of funds. Mr. Hart said that until they sold their news stand, they didn't have the money to pay Mr. Eddy and suggested

(Testimony of W. C. Harding.)

that I get Mr. Eddy to give him a deed and mortgage to these tracts. In other words to deed the land to the Harts and take a mortgage back.

### DIRECT EXAMINATION CONTINUED.

And if that couldn't be done, he suggested that I take some of my personal contracts and trade to Mr. Eddy for these; he knew I had personal contract, and take them over and trade to Mr. Eddy and make it a personal matter between himself and myself. I told him I would use my best efforts when I got to Roseburg and I did.

I don't remember that Mr. Hart ever made any complaint to me about his orchard or the condition in which he found it, during all of these conversations I had with him. I first knew Mr. and Mrs. Hart were dissatisfied when suit was threatened in 1913, the summer or spring. Mr. Hart was then represented by the same attorney who now represents him.

### CROSS EXAMINATION.

I can't remember now it came about that I selected this Rice & Rice ranch as an orchard in the first place. I was the agent who sold the tract to these Colorado people in the first place. Rice got \$50 per acre. The contract that was introduced in evidence has something in regard to \$10,000 that was to go to the owners. I believe the Colorado gentlemen paid Rice & Rice \$10,000

(Testimony of W. C. Harding.)

cash, and they were to have that back first before any other of the money was disbursed. That is usually the custom in real estate transactions, that if a man puts up the money to buy the land he gets that back before a division of the profits is had.

I believe when Walter, Adair, Epperly and these other gentlemen purchased this Rice & Rice ranch, they paid Rice & Rice \$10,000. I got 5 per cent commission on that. That was based on \$50 for 461 acres, whatever that comes to, we got 5 per cent commission on that.

Q. It speaks here of a \$10,000 item and a \$13,061.00 item.

A. We received a 5 per cent commission on the total purchase price.

If these people purchased the Rice & Rice ranch, we proposed subdividing it and selling it as orchard land, which they understood. It was the suggestion prior to the time that they purchased that it was to be planted where the owner desired.

The original contract between Adair, Epperly, Burns, Green and the Harding Land Company, dated July, 1909, was dictated by me to Mr. Hinckley. I haven't read it for some years but would be familiar with its provisions if I should look it over.

At the time of the purchase of the Rice & Rice ranch, the intention on the part of the Colorado bunch and myself was to plat this and sell it as orchard land. Prior to the time of purchase I didn't have a physical examination made of the soils of the tract, except this: Before we bought the tract we discussed the matter with

(Testimony of W. C. Harding.)

different people at Roseburg, notably with Napoleon Rice and his father. The young men were born and raised in the country and had known the tract from their youth. My associates and myself made no physical examination from an expert standpoint.

About the second fall, the fall of 1910, we had a ditch made by a Mr. Caufield who was an engineer from Eastern Oregon, who was then in our employ. Mr. Green reported want of drainage and we had him employed on the tract and on our Plat C, still north of this a couple of miles, six weeks, making main drainage ditches in these two tracts and the exact points where they begin and end, I can't give you. It was done under Mr. Wallace's direction and he can say when he comes on the stand, and so can Mr. Green; the intent was to cut the water off the hill entirely and keep it from spreading over the land in general.

That ditch was constructed along that county road.

I believe there is a little hump or knoll on the southwesterly corner of lot 19, along the road. It would continue back on lot 40.

Q. From that point going northwesterly along the county road, the fall or drainage would be towards this gate?

A. I don't know about that, because this is rather abrupt, as I remember it. I can't give you the exact runs, but this is rather abrupt and then falls quite quickly into what I would consider one of the low parts of this lot 19.

Q. Let me ask you; we take it for granted a drain-

(Testimony of W. C. Harding.)

age ditch along this county road from 4 down to the corner, the northwest corner of 19; now, does this drainage ditch run over this knoll?

A. I don't know; no, it wouldn't naturally run over much of a knoll.

I can't tell you how it gets into this tract, or how it gets out of the tract. I have been along the county road near this knoll about the center of the westerly edge of 19 a great many times. There is a spring from 40 or 41; there are several springs through here.

Q. Is it north or south of this knoll we speak of?

A. I can't tell whether 40 or 41; where that springy ground is.

Q. Do you know of a wet place along the northerly edge of lot 19, where some seepage from the hill?

A. Yes, I know at the bottom of this little knoll here it is wetter naturally than it is right here on the knoll.

I never noticed particularly the kind of grasses that grow in the lower places if you have reference to rushes.

Q. No, I have no reference to rushes. You know in the lower places where it is damp, there is a darker green grass and it is a little bit taller than other places. Does the grass grow taller?

A. No there isn't any of that to any appreciable extent on that lot.

Q. Does it grow any more thickly on this knoll along 19 in this wet place you spoke of?

A. I don't think there is anything there to hurt that lot, sir.

(Testimony of W. C. Harding.)

Q. I am not asking that, I am asking if the grass grows tall there?

A. It is as high as my shoulder and grown all over 18, 19 and 17 today; I don't think any thicker at this spot than any other.

I have walked over that part of 19 and got my feet wet, in the winters of 1911 and 1912; I don't remember of getting them wet there in May; don't remember whether I was up there.

I am very sure about the drainage of lot 4. This ditch along the county road was constructed. I am not certain it didn't go past 19. I am certain it did not go over the knoll, I think the knoll is on this corner; I think it is a continuous knoll that the road goes over.

I think I have made a personal physical examination of parts of the soil on Plat D since we acquired the property. At different times I have been over the tracts with Mr. Green, our care taker and with other people, and we have made physical examinations of it. Right recently we made a rather careful physical examination of it, within the last ten days. We also made physical examinations prior to the last ten days, such as a man would give to any soil that he intended to plant to apples, or give an orchard planting to.

At the time we took over Plat D and placed it on the market, we did not put any drainage ditches over it, that I remember of except this main drainage ditch on that place, there for the purpose of cutting away the hills; when Mr. Green first took this tract of land, the

(Testimony of W. C. Harding.)

first year he had it, he didn't know what it needed with regard to drainage; that winter he found out.

Q. But the water does come down off the hill here, and if that ran down onto the land, what effect would it have on the land?

A. It would make it wet of course.

Q. Now, prior to the time this drainage ditch was put along this county road, the westerly side of the tracts in controversy, and also west of lots 4 and 11, prior to that time the water drained off the hills down on to this bottom land, didn't it?

A. No, I wouldn't say that. The road itself was naturally higher, just the water from going across on this tract and pulled the most of it out here, anyhow.

Owing to the fact that the road was built higher than the adjacent land, before we built this drainage ditch, threw most of the water along the road; it couldn't very well get by the knoll. I couldn't tell just where it did go. It naturally didn't stay on the lot; it probably ran down on this lower land.

Q. Now, I will ask you Mr. Harding, you take the land laying along what they call Swale Creek here, for a long, long time, and the water draining off the hill and standing on that low land there, what effect would that have on a clay soil?

A. Mr. Lundburg, that water never——

Q. I am not asking you whether it did or not; I am asking you if it did that.

A. No it didn't stand on the land.

Q. What effect would it have on a clay soil.

(Testimony of W. C. Harding.)

A. Why, it would make it sour, of course; absolutely sour.

If you had land covered with water any great length of time it would either kill the grass completely, as I have seen it do or there would be swamp grass growth, or a rush grass growth. If it ran on the clay year after year, it would give it the appearance of the white lands in the Willamette Valley. I should think it would have the effect of being deleterious to plant growth.

I may not understand just what effect it would have on the root growth. I am not scientific enough to give a scientific explanation of these things. I simply say that in my judgment, it would be bad for the root growth.

On the westerly side of this tract the hills come as you see the deviations of this line; on the southerly part of the plat the hill comes nearer the county road and the swale portion of this land, and then recede and go northerly. On the other side there are hills right to Wilbur and the general range of hills is tortuous, winds in and out.

Q. Where is the valley the narrowest?

A. I should say right here, that is the constriction.

Q. Speaking of this Sutherlin Valley here, and this narrow place near Wilbur, where the hills come down close; now, freshets of water come; what would be the effect on the Sutherlin Creek when the waters come down, could it take care of it?

A. I have lived here 6½ years; I have passed this tract ever since they have had it every winter, and I

(Testimony of W. C. Harding.)

try to be out there when there was any indication of a freshet condition, and I have never seen any overflow except this so called tail end of what is called Swale Creek in this valley.

That is in 30, possibly 29; about that general region down there.

The southerly end of this tract is right close to Wilbur. The store is right down there two or three hundred yards.

I wouldn't say there was an overflow land down in this part; never saw it overflowed in my life.

This creek was never called Swale Creek; this was called the swale part of this tract; I am pointing to the lower end of Sutherlin Creek.

Mr. L. M. Caufield dug the drainage ditches; and claimed to be an expert in that line. We thought he knew his business at the time.

I didn't say that Plat D did not require drainage. I think that every valley in the Umpqua Valley requires drainage, owing to the fact that the hills shed the water down on the leveler land and it should be carried off in the proper direction. That is our experience in all of our plantings.

I have always considered the soil in Plat D a clayish loam. I don't know what clay is made of. It has a fine texture. I know of clay that I wouldn't call clay loam; a black mud is supposed to be a blue clay; that is one of the geological explanations of our black mud. I wouldn't call that a clay loam, by any manner of means. I wouldn't call adobe a clay loam, such as we have in

(Testimony of W. C. Harding.)

New Mexico, or through there; that is true adobe; it is a clay though, just the same. I can't give you an explanation of the word adobe, only I know it when I see it. It is a soil that bakes like a brick and cracks wide open and is virtually impervious to water. After adobe land has been wet and then permitted to stand, and plowed when it was dried out, it would turn up in great cakes.

I have examined below the surface soil in plat D on 17, 18 and 19 within the last ten days for blue clay. I wouldn't say there wasn't any dense, heavy clay sub-soil in tract 19, but that there was none in that part I examined.

Four of us made an examination by digging probably two feet to thirty inches deep fairly close to the center of lot 19. The soil there was pretty much like the top only with a gradual change you would expect to find that far down, that hadn't been cultivated possibly forever. Soil, however, all the way down. In my judgment it was more compact than the top soil, naturally and would naturally be denser. It was clay loam, not clay. That is what it is called in the Umpqua Valley and is a local expression.

This heavy clay is a denser clay, but I do not know whether on account of being water logged, the character of the soil, or what it is, but it is an extremely dense rubbery kind of soil, entirely different. Anyone would know it in a minute on seeing or handling it—even a child.

Plaintiff's Exhibit H is a publication issued by the

(Testimony of W. C. Harding.)

Harding Land Company and gotten out under its direction. I think the statements and representations made therein are reliable.

Plaintiff's exhibit I is a publication issued under the direction and authority of my company and we considered the statements made therein, with reference to the company and its plan and operation, dependable and reliable.

These pamphlets were given to our agents for distribution for the purpose of attracting investors.

Our idea when we platted Tract D and these other tracts was to get people to buy a ten acre tract or more, so that they could live on it and earn a living, or else have it cared for in later years by our company, or by individuals, as they might choose. We selected all these tracts with that in view.

Q. I hand you plaintiff's exhibit H, and pointing to a picture contained in the same where it says "Young peach trees (early Crawford's). We plant peaches between the rows of apple trees as peaches yield in their third years, and never fail in the Umpqua Valley." Is that a three year old tree?

A. I don't know whether it is a three year old tree or not. I have seen them as large, or larger than that, the third year.

Peach trees begin to bear about the third year.

The statement was made that one would get three boxes of peaches off of a peach tree the third year in the Umpqua Valley and we have Mr. A. L. Kitchen as authority, who was for five years manager of the

(Testimony of W. C. Harding.)

Ashland Association. He is authority for the statement that from two to three 20 pound boxes from three year old trees, was customary in the main.

Q. Were the statements true, as made in that circular or folder there, and did you make them for the purpose of having people rely on the truth of it, that after three years if anyone purchased one of your tracts in which you planted Newtown Pippin and Spitzenburg apples, with peach tree fillers, the income from the peaches would be sufficient to pay the balance of the purchase price on the orchard as required?

A. That was our honest opinion at that time, yes.

I don't know why the peaches didn't grow on 17, 18 and 19 but the soil didn't seem to be adapted *ot* it; it seemed to be of too fine a texture for them. There wasn't enough grit and sand in the soil.

Our experience for the past number of years now is that the peach trees in the Umpqua Valley that do absolutely the best are on the sandiest river bottom loam. When you get the soil of too fine a texture the peach roots do not seem to do well in it and die out.

We proposed to change the peach trees to pears because we were advised that a pear tree would do better, and made the ultimate owner much more money. We thought the pear trees would grow better there, because we were so advised. I can't tell the habits of a tree all together, except this; that a pear tree seems to do better on a finer texture soil than a peach tree. This is the only reason we had for changing. This whole matter was an experiment there in the Umpqua Valley; no

(Testimony of W. C. Harding.)

one seemed to know and we tried peach trees on our various soils, and when they didn't grow we replaced them with pear trees which we were advised would do well.

I think it is true that a pear tree will grow better in a wet soil than a peach tree.

Q. Isn't that the reason why you wanted to plant pear trees on these tracts instead; due to the failure of the peach trees to grow because it was a wet clay soil and the pear trees would grow better?

A. No, I wouldn't say that. I said because of the character of the soil the peach trees died and didn't do well. We had to place something that would grow there.

Q. The matter of moisture had nothing to do with it?

A. I didn't say that, I don't know.

The Peterson tract was planted during the 1910 and 1911 planting. I think that we discovered the peach trees were dying on tract 17 in the later spring of 1912. I don't know what caused it; I only know a good many of them died.

I don't remember the curly leaf on the trees in 18 and 19 in 1913 so much because there were more dead peach trees and more pear trees left. The general impression then was that the peach trees in the main had been removed from 18 and 19, and more pear planting had grown on 17 if I remember correctly than upon plat C. I don't recall about the peach trees on 17, 18 and 19 having curly leaf because there were very few left.

(Testimony of W. C. Harding.)

The Peterson tract was planted during the planting season of 1911; the first growing season on tract 17, then was 1911 and the second 1912; the third 1913 at the time Mr. Kimball and I were out there. Peach trees must have died on 17 the first year; I don't know when they died, but I know they were dead and had been replanted with pears. I noticed when Mr. Kimball and Mr. Lundberg were there with me that the peach trees would have to be replanted to pear trees, in order to give them a square deal. That was in June 1913, I think.

There weren't any peach trees to speak of on 18 and 19; they practically had been replanted to pear trees. The planting was done under the direction of Mr. Geo. Wright and Green as managers; I can't tell you who did the actual work. The pear planting was done in the spring of 1912 because that Fall we turned the tracts over to the Harts, or were supposed to.

I do not know whether or not Mrs. Peterson was ever notified that the peach trees on tract 17 were dying and were not successful and ought to be planted to pears. I never consulted Mrs. Peterson about putting pear trees on there because I never met the lady until she came last year. I knew her address, but don't remember whether or not I ever communicated with her as to the condition of her orchard.

I can't tell you when the pear trees were planted on 18 and 19; the complete planting was done in 1912; that is all I can tell you. I don't say all the peach trees were taken out; I think they were not all taken out but

(Testimony of W. C. Harding.)

I say all the dead trees that were found on the entire Plat D with special reference to 18 and 19 were replaced with living trees by Mr. George Wright and associates in the spring of 1912.

1913 would be the third year of Mrs. Peterson's cultivation and we had to take care of it during that season. I think it is true that the first time I ever talked to Mrs. Peterson about her tract and the first time she ever saw it to know the condition of it was the time she went out there and afterward came back to our office and we tried to square with her the condition of the tract generally and the question of the peach trees.

The orchard as it existed on tract 17 the time I was out was not the kind of orchard called for in the contract on account of the dead peach trees, which would have to be made right. Technically we could have replanted those tracts to peach trees and forced the owner to have taken them, because of the technical wording of our contract, but that wasn't the thought or desire in our minds. Our desire was to give these people, all of our purchasers, in fact, something that would make them money and do well with them, and our suggestion was that they have the pear plantings.

I took Mr. Lundburg and Mr. Kimball out to these tracts and think Mr. Lundburg advised us that neither Mrs. Hart or Mrs. Peterson would pay another dollar on those contracts, or advised us that he would advise them not to pay any more. I do not remember the reasons he gave or the substance of the conversation at all. I guess we talked about the soil. I don't recall saying

(Testimony of W. C. Harding.)

to Mr. Lundburg or Mr. Kimball in his presence that that tract was not adapted to the growing of fruit trees, because I don't believe it today; I think it is absolutely adapted to the culture of apple and pear trees.

I do remember saying to Mr. Lundburg in Mr. Kimball's presence that I thought the Harts and Mrs. Peterson had gotten a raw deal and that I felt sorry for them; I have been consistent from the very start to the finish, that Mr. and Mrs. Hart never had any contention, but I did admit that there should be an adjustment, possibly of Mrs. Peterson's tract. I make the distinction because the Hart tracts had virtually all been planted and replanted to pears and turned over to them in the Fall of 1912, whereas there was this clearing that was spoken of, and at the time when we were out there, Mr. Kimball, Mr. Lundburg and myself, I thought lot 17 went on the other side of this draw and was cut for the ditch but have found since by cornering that it is not.

Q. I still don't grasp just what you are getting at in regard to the Harts. What difference is there as to the condition of tracts 17, 18 and 19?

Court: I understand he has testified a good many times that he claims he has complied with his contract with the Harts, and turned the tract over to them in the Fall of 1913.

A. We are willing to meet Mr. Lundburg as representing Mrs. Peterson.

Court: I am talking about Hart.

A. On the adjustment of her claim, but not the Hart, because we claim we had fulfilled our contract.

(Testimony of W. C. Harding.)

Court: That is what I understood all the time.

I understood that in June, 1913, that Mr. Lundburg had advised the Harts the condition of things down there, because I thought he was hunting a law suit.

It is true that Mr. Lundburg has attempted to secure an adjustment out of court on his own terms, which as I remember was to take this land back at \$50 an acre, and pay these people back their money, or the difference.

### RE-DIRECT EXAMINATION.

I don't know that our company has planted peaches as fillers in any of our plats where they were successful and measured up to the representations of the pamphlet, but there are peach plantings in the valley that I am satisfied do. At the time we planted we did not know that peach trees would not do well there. No one knew as far as I know. We planted them to give the purchaser an income from the third year and on until the apple trees came into bearing. I wouldn't say whether peach trees do well in the valley not far from this locality as I don't know of any peach orchards up there. I know of other places in the Umpqua Valley. We had no reason to believe at that time that peaches wouldn't do as well in the land in which we planted them as they did on other lands with which we were acquainted.

The Harding Land Company was in good financial condition at the time we entered into these contracts and at the time the pamphlets were printed. We were doing a flourishing business and selling a great deal of land,

(Testimony of W. C. Harding.)

both in large tracts and these small fractions. I think the cuts in Plaintiff's Exhibit I were taken from actual photographs and cut down from 8x10 which we have in our possession. I think I have seen them all.

Q. Now, you state in there about the Umpqua Valley being so well adapted to Newtowns and Spitzenburgs. Did you know at the time you issued this pamphlet of concrete examples of the growing and marketing of these varieties of apples in that valley?

A. Yes sir.

Q. I notice on page 15, of this pamphlet, in a concrete statement here of a cultivated orchard near Roseburg with a statement there that a half interest in this orchard of twenty acres was purchased in 1907 for \$2750.00; the new joint owner building a dryer for \$500.00, bought a team for \$300.00, total \$3550.00 on borrowed money at 8 per cent. "He paid the entire amount last Fall from Proceeds of orchard and had a near sum left." Did you know that?

A. That was a statement put out by the Roseburg Commercial Club, and we compiled it. It was from an orchard south of town in what is called the Winston District.

I knew the man who owned it—Mr. Baker, and he carried this out, vouched for it.

Q. Do you know anything about the yield of a Spitzenburg orchard in that immediate vicinity, owned by a man by the name of Smith, about that same time?

A. Mr. Smith had just a few trees; he had, I think, 30 trees and he measured his ground, and it came to a

(Testimony of W. C. Harding.)

quarter of acre; if I remember correctly it came to about \$600 for the year for those thirty trees. That was quite a number of years ago, four or five years ago.

That was about the same time as this other. There are such successful crops there today. Mr. Skinner last year told me that he got \$5000 from 12 acres, for the fruit, consisting of Spitzenburgs and Baldwins and Ben Davis.

In view of the concrete examples that I had personal knowledge of at the time this pamphlet was issued, I consider the statements made therein true.

I was present when Mr. Lundburg, of plaintiff's counsel, took the photographs that have been introduced in evidence here. He had a small camera with him and I believe he took all of them. I don't remember that Mr. Kimball assisted at all, and I remarked to Mr. Green at the time that we were certainly getting the worst of it; although I am not a practical photographer, I have been with Mr. Clark a great many times, our Roseburg Photographer, when taking hundreds of pictures of the Umpqua Valley, seeing his *modus operandi*. This gentleman held his camera down this way and waited until he got to some weak spot in the tract, apparently and flirited the thing around until he got his picture. That was his general method of taking his pictures.

I testified this morning in answer to some cross interrogatories that there were some two or three other parties who made some complaints about their tracts in Plat D, but I don't think any of these complaints were

(Testimony of J. T. Epperly.)

about the soil, or that it was not adapted to fruit growing.

Referring to the testimony given here in regard to swale, we get that clear down there to Wilbur among those old residents and call the lower end of Sutherlin Creek clear down to where it goes under the bridge, the swale; that is the general name of it. Sutherlin Creek is locally referred to as the swale.

Q. You don't know whether or not the pioneer name of that creek, from its beginning, way up near the Calipooia, was Sutherlin Swale or Camas Swale?

A. On the topographical map it is called Camas Swale.

I don't know the pioneer name for the creek, but it is now Sutherlin Valley, Camas Swale.

I am not positive about the cause for the failure of the peaches to prosper in Plat D, except I am under the impression that it is the nature of the soil in a large measure; climatic conditions are one and the same down there in that Umpqua Valley, very much.

(Excused.)

## J. T. EPPERLY

A witness on behalf of the defendant, testified as follows:

I live in Douglas County, and am one of the defendants in this case, and one of the land owners referred to here.

Mr. Burns and myself, Mr. Carney, Mr. John Britton and Mr. Harding all went out to this land before I

(Testimony of J. T. Epperly.)

purchased; we went down across it and came to some ditches that were 7 or 8 feet deep. We examined the soil as best we could and I was pretty well satisfied with it, and didn't go over any more of it.

I have been a farmer all my life and am farming now west of Roseburg. We thought this land was worth \$200 for fruit growing purposes, and that it was good fruit land as far as I knew. The soil seemed to be pretty good down at the bottom of the ditches. The ditch we looked in was something like six or seven feet deep.

I am not very familiar with these particular lots in question here but have been over them; I was over them a week ago last Monday and made the best examination of their condition I could at that time and looked at the trees. Most of them were alive. The dead trees were mostly peach trees.

I am pretty well familiar with the kind of soil in the Umpqua Valley known as black mud, and didn't find any such soil as that on lots 17, 18 and 19 although I looked the best I could.

It was the intention of the land owners from the beginning that the cultivation contracts of the Harding Land Company should be entirely their own affair and separate from the land sale.

When I looked over lot 17, 18 and 19 the other day I found some oats, cheat, vetch, timothy and some red clover making what I would call a rank growth and it looked as though the soil must be pretty rich or it wouldn't grow so large.

(Testimony of J. D. Zurcher.)

We have had an unusually dry season in that locality during the past summer.

I purchased this land for fruit or growing purposes; I acted in good faith and believed that it was really valuable for that purpose. This was also the state of mind of my associates as far as I know. It never has been my intention to deceive anybody or cause anyone to be dissatisfied.

As far as I know, from what I have seen and observed of that land, and its history under cultivation it is first class fruit land; of course, I am no expert on orchard lands. I didn't see anything in connection with that soil to indicate that it is not first class land for apples and pears.

The market value of land now is not so high in that locality as compared with the market price of 1910.

## J. D. ZURCHER

A witness on behalf of the defendant, testified as follows:

I have lived in Roseburg for seven years and am in the abstract business. I was formerly secretary of the Roseburg Commercial Club for one year.

In my business, we represented two firms who lend money on Douglas County property. It is part of my business to ascertain the value of lands offered as security.

I heard the testimony of Mr. Harding with reference to what is known as the Baker orchard. I prepared that

(Testimony of J. D. Zurcher.)

statement myself which was contained in the pamphlet, after conferring with Mr. Baker. I was secretary of the Roseburg Commercial Club at the time and I visited Mr. Baker's place south of Roseburg; he gave me the facts as stated therein, and I verified them by going to the bank where he borrowed the money and verified his statement that it was all true.

With reference to the statement being true or false with reference to the fruit possibilities of the Umpqua Valley it has been my observation that it is true, if a man will put the work in his orchard; that he can make money if he will work.

I have had occasion in a number of cases in connection with the Commercial Club work as well as money lending work, to know what has been done in the production of fruit there. The soil and climate of Douglas County is well adapted to the raising of fruit, commercial values.

I heard the statement read this morning by Mr. Lundburg from one of these pamphlets of the Harding Land Company which is in evidence as to some of the possibilities of Douglas County and would say that it is true.

I am well acquainted with an orchard lying out from Roseburg opposite the fair grounds which was referred to in the testimony of Mr. D. C. Pitzer here. The reason it has not been a success is because the bed rock is about six inches from the top of the ground. That is common knowledge in Roseburg; nearly everyone

(Testimony of J. D. Zucher.)

there who knows anything about the orchard business at all knows it.

I have been over the lands referred to in this case, lots 18, 17 and 19, Plat D. I saw them last on Tuesday of this week. Mr. Green, Mr. Bradburn and Mr. Clark of Roseburg were also there. Mr. Clark is a photographer and took four views of these tracts while there. Mr. Clark has a good standing as a competent photographer. He appeared to be using an 8x10 view camera.

Q. I will show you now some pictures which are numbered 1, 2 and 4.

I recognize these four pictures as being views taken by Mr. Clark on, or in the immediate vicinity of these lots, 17, 18 and 19 and was present when they were taken. They are true representations of what they purport to represent as to the lot hereafter testified.

Said pictures offered in evidence, and marked as Defendant's exhibits 37, 38, 39 and 40.

Exhibit 37 represents a photograph of lot 14, Plat D, looking at it in almost a northerly direction. The camera was placed in the roadway between lots 14 and 17, on a tripod and I should judge it was about five feet in height.

Defendant's exhibit 40 represents a view of lots 18 and 19 plat D taken from a point in the middle of the road a little to the east of the line dividing 18 and 19 and 12 and 13. That is a line running northerly and southerly a little to the east of the four corners, which would be in the middle of the road there, looking almost

(Testimony of J. D. Zurcher.)

southerly; the corner stake is in the foreground of the lot right there, that is the corner between 18 and 19.

Defendant's exhibit 38 is a view taken from the same point that no. 1 was; it was taken from the same point as 37, looking in the opposite direction; that would be between 14 and 17, looking over 17; the camera was turned upon the tripod and pointed in exactly the opposite direction from the other one taken in that direction, but the tripod was not moved. Those trees are on 17.

Defendant's exhibit 39 represents a view of lot 17, taken from the same position as exhibit no. 40 only looking in the opposite direction, the tripod remaining in the same place and the camera turned right around on the tripod, looking the opposite direction; that is, looking in a southerly direction, almost south.

The trees that show in exhibit 38 are on lot 17. The trees shown in exhibit 39 are on lot 13.

I went over lots 17 and 18 at the time these pictures were taken and observed the surface, particularly of 17. I didn't see a rock on any of it, except in the creek that runs down through where there was some small gravel, probably as big around as a hen's egg.

I am acquainted with the market value of fruit lands in Douglas County as they are now and as they were in 1910, and I would say it was at least 50 per cent less today than it was in 1910.

I am familiar with the soil there in the valley known as black mud and saw no black mud any place on any of these lots which I visited.

(Testimony of F. S. Green.)

I am well acquainted with Mr. Hart and I met Mrs. Hart at the time she visited Roseburg in July, 1912. I talked with both Mr. and Mrs. Hart in the office of the Harding Land Company and I asked them, when there, how they liked Douglas County, or especially Mrs. Hart, because it was her first visit, and how they liked their investment, and she told me they were well satisfied. She said they had been out looking at their tract, and she was well pleased with it. She said the tract was over at Wilbur. Nothing was said about Mr. Hart's tract when talking with her. I had several occasions to talk with Mr. Hart about his investment there in Plat D and each time he told me it was fine and that he was coming there to live. I have seen him several times since then. I never knew before I heard of this suit in the newspapers that he had any complaint about his investment in Plat D.

### CROSS EXAMINATION.

I didn't make a physical examination of tracts 17, 18 and 19 except to walk over it and have never made a physical examination of the soil on those tracts.

I have had business relations with the Harding Land Company in regard to abstracts.

**F. S. GREEN**

Called on behalf of the defendants, testified as follows:

I am one of the defendants and one of the land own-

(Testimony of F. S. Green.)

ers in this case. I have resided at Wilbur since August, 1909. I am living on part of the old Jack Chenoweth place.

I made no investigations as to the actual merits of this property for fruit growing purposes, before purchasing excepting to talk with people over the country. I satisfied myself that it was first class fruit land.

I have been a farmer all my life and am farming now.

My contract with the Harding Land Company was made with honest motives to put good meritorious fruit lands on the market, and I have never indulged in questionable schemes. I believe that I was putting on the market the very best kind of fruit land, and still believe that.

I planted and cultivated the lands in Tract D that were sold by the Harding Land Company; I plowed and planted and then cultivated them three years. 18 and 19 were planted at a different time from 17. 18 and 19 were planted in March, 1910. After the lots were planted, I disked and harrowed them every year which was the principal part of the cultivation. I aimed to go over them every ten days or two weeks during April, May, June and July. The first of August is the close of the cultivation season, in order to give the trees time to ripen up for winter weather. I have heard that if you cultivate later you will produce a tender growth of wood that will not survive the winter cold, but I have never had such experience. I would say that it is

(Testimony of F. S. Green.)

the custom of this country as I understand it to cease cultivation about August first.

These trees were also pruned and sprayed; the pruning was done any time after the first of January each year during the three years. I aim to spray before the bud starts in the spring. On 18 and 19 I didn't spray the first spring, that is, when just little switches were set out. I did after that. I considered the spraying such as good orchard management would require. We sprayed for scale with lime and sulphur which is the customary practice and according to good orchard practice in that locality.

My care for all these trees ceased in the fall of 1912. At that time the condition of the orchards were good. At that time the orchards contained a few peaches and quite a good many pears and two kinds of apples, Spitzenbergs and Newtowns. The original planting was two kinds of apples and the peach trees but the most of the peaches died on account of those orchards not being adapted to peach trees; I think they had proper care as far as my care was concerned. When the peaches died, most of them were replaced with pears; that is, the first year we replaced peaches, and when they commenced to die saw the peaches were not going to grow, so we replaced with pears.

In the fall of 1912, when I had finished with the three years' cultivation, the apples were practically all alive; there might have been what might be called two or three dead apple trees to the acre; I don't remember just what proportion of pears were planted, but I think

(Testimony of F. S. Green.)

between one half and two thirds pears planted in place of peaches.

As I stated before, the first peaches that died out, were replaced by pears; later on more peaches died, and more pears were planted, but that was so late the pears didn't make as good growth as the first planting. However, they grew and thrived.

At the end of three years' care I gave it, I would call it a good orchard; I have twenty acres there, and I don't see but what it is just as good as mine.

Tract 17 was planted in February, 1911. We could have planted this ground in the month of February, successfully; I don't find it too wet to work in January. I have worked on 17 in the month of January. We gave the trees on 17 the same care as we did the others, up to the fall of 1913. The trees were average in size; the peaches acted a good deal as on 18 and 19 in regard to dying out, and we planted a few pears but I don't know what proportion, but not as great as on 18 and 19. We put these pear trees in place of the peach trees that had died; I don't remember just when, excepting that it was some time in the spring, by instructions from the Harding Land Company. Mr. Wallace generally talked to me about the planting and care of Plat D.

The first year I was there I had a man with me that had a good deal of experience or claimed to have, and I think he had from the way he went at it, from California. His name was Walter Langford and he helped me about 2 months. A little later I had a Mr. W. D. Phillips who helped me most of that summer. He was what

(Testimony of F. S. Green.)

some people call an expert. I didn't know what an expert meant until he got there, but he had a great deal of experience in Colorado, planting and managing large orchards. He gave his attention to the proper handling of these lots and when anything was needed in the orchard he knew what it was, and if I didn't see it he was there to advise me about it.

I certainly tried as hard to do my work properly and produce a good orchard as I ever did anything.

I bought two lots—the bare land—from the Harding Land Company, but didn't enter into contract for cultivation. I signed up a similar contract aside from the cultivation. I planted one lot to apples and the other to peaches; they were 14 and 15. They were both planted in the spring of 1910. I have been cultivating them from year to year since planting and I think the success will average up with those on the rest.

I recognize defendant's exhibit 37 handed me; I should judge it was taken with the camera sitting in the road about half way east and west on these lots; that is the road between 14 and 17; right about the center looking in a rather northerly direction and I think it shows one of my lots and the other in the distance. The trees in the foreground are on lot 14 and the background is part of lot 15, which are my lots. This picture was taken just a few days before we came up here, by Mr. Clark and is the same time Mr. Zerker was testifying to.

Defendants' exhibit 38 is the second picture that was taken; as I said before the camera sat in the road, and when we took this picture the tripod stood still and we

<sup>1</sup>(Testimony of F. S. Green.)

just turned the camera around and took this picture looking over 17 in a southerly direction.

Defendant's exhibit 39 was taken right across the road from lots 18 and 19; the camera sat in this 30 ft. road that goes out from the county road between 17, 18 and 19.

Q. In the road between 17, 18 and 19? Now, as between what lots?

A. Was numbering three on one side and 12, 13 and 14 on the other.

You can see the corner stake between 18 and 19, but as I remember it just a little bit east of the line because it gave the picture of two lots, not in full, but the main part, and after we took that picture the tripod wasn't moved at all, the camera just simply turned around and took this one looking north over 13.

### EXAMINATION BY THE COURT.

That is, defendant's exhibit 40. I was going to tell the reason we didn't put the camera right on the line. We wanted to take a picture of this lot; you can see a little bit across between the lots where the low spots and that commences; that lot wasn't cultivated; we didn't want it across, but wanted to show the trees. Those trees are as large as those others and were planted in the spring of 1910. These branches without leaves that are seen sticking up in this picture are on the apple and pear trees that the grasshoppers ate the leaves off, and are the same trees that are in question in this case. The

(Testimony of F. S. Green.)

only way I can account for the grasshoppers is the same as in Kansas; the grasshoppers stay where the grass is; where the ground is cultivated there is nothing to eat on and they won't stay. These lots in question have lots of grass and weeds on, and of course, afford shelter for the grasshoppers, and as the grass dries up they work on the trees.

#### DIRECT EXAMINATION CONTINUED.

Lots 18 and 19 particularly have much darker soil than 17, and as you go across 18 it gets a little lighter as it goes toward the other side. My lot 14 is the same soil as 17 and a good deal the same as 18; I can see no difference at all in the looks or the way it handles. Lot 15 is the same as the rest, or 14 and 17; so I would say that 14, 15 and 17 are all alike, and I have demonstrated it by actual work and cultivation of the land.

I think there is a slight difference in comparing with 18 as it gets a little darker soil as it goes up towards the county road. I don't see any difference in the fertility of my lots and these lots, or in the matter of water and time of cultivation. You can cultivate 17 18 and 19 the same time of year you can cultivate 14 and 15; as a whole lots 17, 18 and 19 are not any wetter land than 14 and 15; there is a little spot of about half an acre on 19 that is wetter than these others, where there have been trees, but there is nothing but grass and weeds there now.

There is grass growing all over 17, 18 and 19 that some might call wire grass, but I wouldn't call it that

(Testimony of F. S. Green.)

myself. Assuming wire grass is grass growing all over wet or swampy land, there is no grass on these lots that indicate that kind of soil unless it would be in this half acre I spoke about. Besides the fruit trees on these three lots there are oats and a little timothy and a little clover; timothy and clover is mostly on 17 as I noticed, and another tall grass on the soil out there that we cut for hay, that I don't know, but it looks a little like cheat. These grasses make a good growth.

I farmed the land which lies immediately east of lot 17, which would be on lot 16, and raised good wheat there. Looking to the south of lot 17, on lot 22, I have never raised anything on that land; most of it was cleared since and planted to apples and peaches and there are a few peaches and apples *onit* now which have done finely. Lot 22 has not been too wet for orchard purposes.

There are good trees on lot 21, south of 18; it is too wet for peaches, but not for apples.

The natural drainage through the two tiers of lots, 12, 13, 14 and 15 and 19, 18 and 17 is southeasterly and is pretty gentle. In driving into the roadway between these two tiers of lots, I would call it a level tract of land; just a little gradual down hill as you come out in here.

I never saw lots 17, 18 and 19 overflowed or knew of such a thing. There might be this corner of 17 next to the creek that the water might get on a little bit. By the creek I mean that deep ditch, which comes right on the line, if I remember. It might overflow in extreme high water but I never saw it.

(Testimony of F. S. Green.)

I have seen freshets and high water in that country and saw the highest water around there since '67 and it didn't overflow 17 that I know of; I saw no indication of its overflowing.

As to surface drainage, the Harding Land Company put a ditch in along side of the road, starting in about lot 35 on west side of the road, and goes down the west side until its gets close to the corner of 12-19; crosses the road there and cuts the corner of this lot then comes out and angles just a little down through 19 and then down between two rows of trees and on down to the creek.

#### EXAMINATION BY THE COURT.

When they made the ditch, it was about  $2\frac{1}{2}$  feet; now it is filled a little bit in some places and washed deeper in some places; I should judge it is washed to  $2\frac{1}{2}$  or 3 feet through 19; in 18 a ditch that is plowed out would be some little deeper; a man that lived there told me he had plowed that ditch out; it starts in at 5 and through these lots, 10, 13, 18 and 21 down to the creek; that ditch was deeper of course at the creek and gradually run shallower up here and through these lots here. The hills extend around on the north; this is valley here and hills over here; this is drainage that has been done with the plow, except just furrows plowed on these particular lots, 18 and 19.

(Testimony of F. S. Green.)

### DIRECT EXAMINATION CONTINUED.

The furrows are plowed to let off the little surplus water that might stand in little puddles around; they run out here on these next lots; when I was taking care of them I would plow the furrows clear out to the creek or to an outlet somewhere.

I have dug corner post holes four feet deep and found it wetter on the bottom than on the top; I don't see why water won't go through; I don't know how it got in there. I don't think it possible that the soil is impervious to water and I am sure the moisture goes through.

Plaintiff's Counsel: We are satisfied of that too.

Defendants' Counsel: All right, I am glad of it; thank you.

The first two years I cultivated there, I took the same kind of care of the lots as I did my own, but the last two years I had a little too much to do and neglected my own to take care of the others. To make these three lots successful orchard tracts after my period of cultivation was done, it was necessary that they have good cultivation, spraying and pruning.

I think this soil on these lots is better than the average in that community. I never heard or saw anything on any of these lots on plat D that could be called hardpan or joint clay that the water wouldn't go through.

I recognize all these photographs handed me; they were taken in the spring of 1914 by Mr. Clark of Roseburg and I was present when they were taken. They are

(Testimony of F. S. Green.)

correct representations or views of what they purport to represent.

Said pictures offered in evidence and marked defendants' exhibits 41, 42, 43, 44 and 45.

Exhibit 41 is a picture of lot 18 and that is my handwriting on the back; I think it was taken in April. The man standing in the picture is myself. The trees are some of those fruit trees on lot 18 that are referred to.

Defendants' exhibit 42 is a picture of lot 19 taken from the far side of the lot looking rather southeasterly and I am the man shown in the picture. I think my height is about 5 feet eleven.

Defendants' exhibit 43 is a picture of lot 12 and was taken at the same time just across the road from 19; they don't show up as tall as the others as they had been pruned in the spring and those others hadn't been pruned. The fruit trees shown are the trees in question in this case; the lot across the roadway is lot 12.

Defendants' exhibit 44 is a picture of the east side of lot 18; that is myself standing in there; it was taken at the same time as these others and shows some of the fruit trees in question in this case, on lot 18.

Defendants' exhibit 45 is a picture of lot 19 with the camera set in the same place as it did in taking the west side of lot 18, only this is looking the other way on lot 19 and shows some of the trees on lot 19 in question in this case.

These photographs give a fair average idea of the trees on these lots at the time the pictures were taken; we didn't attempt to pick out the best trees, and I think

!(Testimony of F. S. Green.)

the pictures show all the trees, unless it would be right where the camera sat.

I was on plat D at the time Mr. Lundburg and the other gentleman—I suppose Mr. Kimball—came there in the summer, sometime of 1913. At that time there were a few clods on lot 17. I never saw anyone do any cultivation in orchard tracts in the spring of the year but what had some clods in the spring; as quickly as I had time to harrow and roll the orchard, the clods were gone; I rolled it with that corrugated iron roller which was my custom with reference to these lots while I was cultivating. After this treatment there were no clods there to speak of.

My object in cultivating the soil around fruit trees is to get it into a dust mulch, which I did with these lots. I did this with this identical lot 17 after these men were there.

One of these gentlemen *sopke* of getting his feet wet on some of this land on his visit in June, 1913, but there is no land there upon which he could have gotten his feet wet in the absence of an immediate shower, unless it might be this half acre to the west side of 19. Preceding their visit, the weather had been dry for a long time.

I have never seen anything on lot 17 or any of the other lots that could be called rock, stone or boulders; maybe in plowing we would hit a little stone, maybe two inches in diameter, but no stone scattered over the surface at any time.

I don't know anything about Mrs. Peterson's visiting the land in May, 1913.

(Testimony of F. S. Green.)

Since my time ceased on these lots the only thing done was the Harding Land Company hiring a man there; I suppose they did it for Mr. and Mrs. Hart, to look after lots 18 and 19 in 1913. He did a little; he pruned some of them a little bit, then he plowed up and down the rows, between five and seven feet wide, throwing the dirt up to the trees and left it that way. About two months after that he went over it with a single horse spring tooth cultivator, twice. I wouldn't call it adequate or proper cultivation; I wouldn't have given him anything for what he did, he did so little.

Nothing was done on 17 after the expiration of my stewardship.

Without counting, I should judge at this time, in going over these lots that there are about two or three dead apple trees to the acre; there is occasionally a dead pear tree, but not as great a number, according to the acre as there is of the apple trees. Of course, there are very few peach trees on the land. A few more peaches on 17 than on the other two lots, 18 and 19.

It wasn't over ten days after Mr. Lundburg and Mr. Kimball were there, that I got this ground into condition; there is quite a little difficulty in cultivating if you don't do it at the right time. More particularly on lot 19 than the rest; it is harder to handle; if it is done in the spring when it ought to be done, it is easy enough to cultivate, but let it dry off and it gets a little bit harder on the surface than 17 and 18.

This land is no different with reference to the way of handling it, or weather conditions, than ordinary soils.

(Testimony of F. S. Green.)

It is necessary to plow all soils at the right time to cultivate them. I don't believe even the river bottom soil can be neglected and plowed in the summer time without using a reavy disk plow and several horses. There might be some small patches that can be done, but I have found some sandy soil, when dry, almost impossible to plow.

I can recognize plaintiff's exhibit D-1 by the house-mover there; it is taken some place on plat D looking towards that hill over there.

Plaintiff's exhibit D-2, I was going to say is the same thing, but not so many trees here; the only thing is these houses over on the other side of hill, I guess down by the creek where some vacant lots are.

I do not remember plaintiff's exhibit D-3.

I would say plaintiff's exhibit D-4 was taken in the valley somewhere.

I do not recognize plaintiff's exhibit D-5. The clods shown in this picture do not look like the clods that were on lot 17 when these gentlemen, Mr. Lundburg and Mr. Kimball were down there. There are lots more big clods there; now when a disk goes over the land twice, one way and the other, it won't leave clods that large.

Court: I understand you hadn't been over this with a disk when these gentlemen were there, had you?

A. Maybe I don't make this plain, but I had disked this ground twice, but I hadn't rolled it.

On plaintiff's exhibit D-6 I recognize the log which I think is right to the line between 17 and 22, and this

(Testimony of F. S. Green.)

particular tall tree; there are two standing trees over on 22.

I am not positive whether or not the lot itself is on 17 or 22, but it is right in the vicinity. As I remember it is lying on the bank in some of the ditches there. I don't think it would interfere with cultivation; I don't remember its being in the way when we were cultivating. These two standing trees I am positive are not on lot 17. They are on lot 22.

I do not recognize plaintiff's exhibit D-7.

In plaintiff's exhibit D-8 I could recognize the picture as showing the valley above plat D, but I couldn't say where it was taken. I suppose it was looking at the valley.

The peaches had something we called curly leaf but I do not know whether or not it was technically curly leaf. The color of the foliage on the apple and pear trees on these lots from year to year was good; the apple has a dark green and as I remember the pears it is a lighter green. If a tree is not in good health it would be more of a yellowish color. The trees were in sound, healthy condition when my care for them ended.

The trees referred to in the testimony as being uncleared land on lot 17 would take in two rows of trees, or about a fifty or sixty foot strip, and ten feet wide. The trees displaced by this, I would say would be an apple and a peach in each row or four trees altogether.

I remember a man by the name of McCroskey; I met a man with Mr. Lundburg in June, 1914, but I don't remember the other man's name. I saw Mr. Mc-

(Testimony of F. S. Green.)

Croskey and the two gentlemen who testified as agricultural experts. I didn't see the county agriculturist, but Mr. McCroskey is this tall gentleman you spoke of. I think I saw him there in June, 1914, with Mr. Lundburg. I never saw the agriculturist before to my knowledge. I did not point the land out to either Mr. McCroskey or Mr. Lundburg or give them any directions. I saw Mr. Lundburg take part of the photographs introduced here in evidence; as near as I remember he held his camera down to get a view of the trees and the ground surrounding the trees, that is all I can tell you about it. I should judge there are  $2\frac{1}{2}$  feet difference between the height he held his camera and the height of Mr. Clark's camera. Mr. Clark's was the higher.

The quality of the nursery stock planted on these lots was first class.

### CROSS EXAMINATION.

I planted the same kind of trees on 14 and 15 as were planted on the rest of the tract; that is the way they were marked when they came from the nursery; they might come without true names. I fertilized the ground on my tract by putting on a little barnyard manure after it had been planted two years. Also a little of what some people call land plaster. Some say this is to sweeten the land and some say stimulated the wood growth—I don't mean wood growth, I mean growth of grasses; I put it on as an experiment. I didn't put any land plaster on the other tracts, but Mr. Harding's help that

(Testimony of F. S. Green.)

he had out there did; I don't remember how much they put on; I put on I think a thousand pounds on 20 acres as near as I can remember. I do not recall having told you that in caring for the other tracts they just sprinkled a little bit on.

They did not put any manure on 17 that I know of. I am not positive the land plaster was put on 17, only I know they aimed to put it on all of those lots. I couldn't say positively that it was put particularly on 18 and 19.

I remember saying in my testimony that wherever necessary outside the ditches the Harding Land Company made, I plowed furrows out; wherever a little puddle of water that will stand sometimes, I let that out by plowing furrows. If this soil had been soil through which water seeped rapidly, that is, free soil, so it could have under drainage those puddles wouldn't stand very long but I didn't want them to stand at all. I think it would be necessary to dig on any soil where we have rain like we have in Oregon, unless it be the sandiest soil we have.

The drainage ditch constructed by the Harding Land Company starts on the road in front of lot 35. It startso on the west side and runs across the roadway between 12 and 19. I couldn't tell without counting up how many acres lie west of the road here. The hills run back pretty well; here they come down closer to the road. They are fair size hills for Oregon.

(Testimony of F. S. Green.)

### RE-DIRECT EXAMINATION.

Lots 11, 12 and 9 have had the same treatment as ours. Lot 12 had a little manure on it last winter or the winter before. Mr. Adair never put any manure on his. The soil of his lot is just the same as 17, 18 and 19; a little darker than 19.

### RE-CROSS EXAMINATION.

The trees shown in defendants' exhibit 37 are peach trees and apples. The widest tree in the foreground is a peach tree and the one to the right is an apple tree; the one a little further back is a peach tree and the one next to the edge of the picture is an apple tree. The one just to the edge of the left of the picture is a peach tree. I never counted the peach trees that died on my tract but most of them are dead; possibly between one-third and one-fourth of the peach trees lived.

On 17, I should judge between a fourth and a fifth of the peaches lived; on 18 and 19 hardly any at all there. The soil on 18 is a little lighter than on 19; when you start right to survey the line may be the same color, but as you go down towards 17 it gets a little lighter. The only way I examined the subsoil is by digging into these ditches and digging the post holes. It is the same kind of soil with the exception of a little lighter in color as it gets down.

(Excused.)

(Testimony of L. B. Wallace.)

L. B. WALLACE,

A witness called on behalf of defendant, testified as follows:

I know the handwriting of Glenn D. Hart. Referring to defendants' exhibit 29, and to the entry under date of Monday, July 15, 1912, opposite No. 33, "Glenn D. Hart and wife" is written by Glenn D. Hart.

Plaintiff's Counsel: We admit that as his signature.

Defendants' Counsel: The entry is Glenn D. Hart, Deadwood, South Dakota. Let the record show it is offered and admitted in evidence and the particular entry is the signature of Hart under date of July 15, 1912.

I first came to Oregon, August, 1909; commenced work with W. C. Harding Land Company on September 6, 1909; worked with them in the office selling real estate and doing office work from September 6, 1909, until May 16, 1910. I then bought stock in the W. C. Harding Land Company and became secretary and treasurer of the company, occupying the office of secretary all the time until July or August 15, 1912, and treasurer part of that time. I wish to correct my self; I was secretary until the winter of 1912 and assistant secretary from that time on. I severed my connections entirely with the Harding Land Co. on August 15, 1915. I ceased to be a stockholder at that time and am not interested or connected with the company now, excepting as one of these land owners, defendants in this case.

(Testimony of L. B. Wallace.)

I came to have an interest in this land through the representations of Dr. G. C. Bradburn, when I came to Roseburg in 1909; this proposition was put to me to take the place of C. H. Carney, whom I happened to know, and I did so. I believe the original purchase of the first land owners was in July, 1909, and I bought in the latter part of September, 1909. Before buying I went with Mr. Green to Wilbur and looked over the land as thoroughly as it was possible to do in an afternoon, and went back to Roseburg and invested. I satisfied myself that this land, which was afterward platted as Plat D was first class fruit land. My interest in this matter was absolutely in good faith. My interest was \$2200.00 or one quarter.

As an officer of the company I had general supervision over the cultivation of several of their plats. I gave the general instructions to the man in charge of the plats. Confining myself to plat D this would be Mr. Green. Mr. Phillips was the first man there representing the company, who was a tree expert from Colorado, having had experience in Grand Junction, which is a celebrated apple growing district. He was there approximately a year; he was hired by the W. C. Harding Land Co. and acted as an expert, going over the entire Plat D, pruning the trees and giving them what expert care they needed and seeing that they received proper attention.

After Phillips, we had Mr. Wright, a tree expert having had a great deal of experience in Eastern Oregon, and in fact over the Northwest, Oregon and Wash-

(Testimony of L. B. Wallace.)

ington both. His first name was George. I do not know where either he or Phillips are now.

Mr. Wright did the same as Mr. Phillips, having charge of the trees, looking after the growth of the trees, to see that they were properly pruned, and the proper spray used and that they had the proper care.

I can't say how often I visited Plat D after the planting began; I was out there off and on all the time; that is, I was going out there very frequently to see that the work was progressing properly and that Mr. Green was living up to his part of the contract. I found the work done on 17, 18 and 19, generally speaking, good.

Tracts 18 and 19 were planted in the spring of 1910. The work consisted of cultivation of the ground, plowing and the disking and harrowing and general cultivation of the soil. The trees themselves had the proper pruning and spraying that young fruit trees ordinarily receive.

From year to year I observed the condition and appearance of the trees on 18 and 19. The apple trees were healthy but the peach trees didn't do good after the first year. When we planted 18 and 19 in the spring of 1910, we planted them according to the contract, apples and peach fillers. The peach trees made a very satisfactory growth, and we found later on at the end of the year, in the winter of 1910, 1911 that the peach trees wouldn't grow successfully in this soil. I took the matter up with Mr. Glenn D. Hart when he was there in the winter of 1911, and he instructed us to plant—that is, I am a year ahead of myself in this. We

(Testimony of L. B. Wallace.)

thought that the peach trees would grow after they had had a year's growth on these two lots, 18 and 19, and in the spring of 1911 we replaced the few peach trees that had died with new peach trees, and we didn't satisfy ourselves until 1912 that peach trees wouldn't make a satisfactory growth in this land. So we first took the matter up with Mr. Hart in February, 1912, I think. This was in the office of the Harding Land Company at Roseburg; Mr. Hart was acting as one of the sales managers for the Harding Land Company and was after he had become a stockholder.

Mr. Hart said to go ahead and replace the dead peach trees with pear trees. The peach trees that had not died were not replaced. This arrangement referred to both lots 18 and 19. After that we planted trees, replanting the dead peach trees with pear trees in the spring of 1912.

I believe Mr. Hart first saw these lots, 18 and 19 in 1911. I was acquainted with Mrs. Hart but not Mrs. Peterson and had never seen her before this trial.

Mr. Hart was also second vice president of the Harding Land Company for a time.

I remember Mr. and Mrs. Hart visiting Roseburg in July, 1912, and going out to Plat D, but don't know who took them out. I heard the testimony to the effect that I had taken them out, but I did not, and never took them out to plat D that I remember of. I never had any conversation with them about substituting Garden Valley land for their orchard. I showed the Harts over the Umpqua Valley pretty generally after their first

(Testimony of L. B. Wallace.)

day or two at Roseburg but I can't say as to whether I went to Garden Valley or not. If I did, it had no reference whatever to exchange of Garden Valley land for Plat D land. I had a talk with them in July, 1912, with reference to their Plat D land and they seemed to be perfectly satisfied with this exception Mrs. Hart seemed to be disappointed that the peach trees had not proven to be satisfactory on these tracts, but when I mentioned to her the fact that Mr. Hart had instructed us to plant pear trees, she seemed to think that the company had done all they could do, and apparently was satisfied. Neither one of them told me that they were dissatisfied with these lands, to my knowledge.

No one who ever purchased any land in Plat D, through our company ever indicated to my company or myself in any way, any dissatisfaction with the soil in Plat D.

The chief failure or difficulty on Plat D was the peach trees; the pears and apples on 18 and 19 were good. I saw them often during the time of the Harding Land Company's contract to keep them cultivated. The last I remember having seen these tracts was in the summer of 1912 and their condition was good.

I had a conversation with Mr. Hart in 1912 I believe, regarding the payment for 18 and 19 and he talked and acted for Mrs. Hart in the matter. He said that they would take care of them just as soon as it was possible to do so. He made no complaints about not being satisfied.

From my experience I would say that the land on

(Testimony of L. B. Wallace.)

lots 17, 18 and 19 is first class land for apple and pear trees. I am familiar with the black mud in the Umpqua Valley and do not think there is anything on either of those lots of that character. I have been over the lots pretty thoroughly and satisfied myself as to the depth of the soil when I first went out to see the lands.

The appearance of the foliage on 18 and 19 as I saw them from time to time was dark green. Lot 17 was planted in the winter of 1910-1911.

It was shown in evidence here, that the contract with Mrs. Peterson for lot 17 was dated in October, 1910, and the contract acknowledges receipt of a payment in April, 1910; this was due to the fact that the first two payments of Mrs. Peterson were not sufficient to justify the Harding Land Company to enter into a \$3500 contract and we refused to issue a contract until a sufficient amount of money had been paid which justified us in going ahead and planting Mrs. Peterson's lot. When the contract was issued she had then paid sufficient for us to go ahead. I think 17 was actually planted in the latter part of the winter of 1910-1911, that is, I mean possibly in February. It was planted to peaches and apples.

The Harding Land Company always purchased the best trees that we could buy, buying from four to six foot trees and we put that kind of trees on those lots. The same work was done to care for 17 as on the balance of the plat D. The pear trees were planted on 17 at the instruction of Mr. Glenn D. Hart. I asked him as to the replacing of the dead peach trees with pears on

(Testimony of L. B. Wallace.)

Mrs. Peterson's tract shortly after he instructed us to plant pear trees on Mrs. Hart's two tracts, and he said to go ahead replacing the dead peach trees with pear trees and he would vouch that it would be perfectly satisfactory with Mrs. Peterson. I knew he was an old acquaintance and friend; I don't know whether he mentioned it at that time or not. In accordance with this, I gave instructions to people on the ground to plant pear trees.

There has been some testimony that I apologized for the condition of the land to Mr. Hart and his wife in July, 1912, but I did not.

I have never seen any evidence of any rocks on any of this land, particularly lot 17.

I know of the orchard that failed across the road from the fair ground near Roseburg; there was shell rock probably within six or eight inches of the surface of the ground, which is well known in that locality.

I am familiar with the contents of the pamphlets, plaintiff's exhibits H and I and to the best of my knowledge and belief the statements in them are true. In plaintiff's exhibit H, it states that one box of peaches could be produced on peach trees the third year.

### CROSS EXAMINATION.

At the time I went out and looked at the Jack Chenoweth land, my object was to purchase it and after looking it over I was satisfied with the appearance of it.

I am not an experienced man in soils, or a farmer

(Testimony of L. B. Wallace.)

and my only experience in managing and developing orchards was in the Umpqua Valley and only in an office way. My object particularly was a good investment and good returns on my money and from that point of view, I thought this looked good, and that was my object naturally in going into it, to make money on the investment. I was particular as to what kind of land it was and wanted to get my moneys' worth before buying it.

I said I took this matter up with regard to peach and pear trees with Mr. Hart in February, 1912, and was acting secretary at the time; Mr. Hart was second vice president, I believe. He was not second vice-president, before he became sales manager.

I would have to go through defendant's exhibit 1 to identify it absolutely, but that is my signature and the date is March 2, 1912, so Mr. Hart was not a sales manager at the time I took up this question of changing the peach trees to pear trees.

I am absolutely positive that I talked with Mr. Hart in regard to making the change in planting out there at that time and have a distinct recollection in regard to it; we were in the office at the time. I do not remember of any communications by way of letters that passed and think we made that arrangement in February, 1912. The orchard was first planted in the spring of 1910. We renewed the dead peaches the second time the first year. Mr. Hart instructed us at that time to substitute pear trees for dead peach trees. Up to this time I had never met Mrs. Hart. I first met her in the summer of 1912,

(Testimony of L. B. Wallace.)

in the office of the W. C. Harding Land Company, Roseburg, Oregon, in July, I believe. They were there at least several days, if not a week or such a matter. I do not remember what part of the week. I said on my examination that I did not take them out to the tract at that time. I am positive I do not remember a third party with Mr. and Mrs. Hart. It is not a fact that at that time I took Mr. and Mrs. Hart and this third party out to this tract in an automobile and showed them the 17, 18 and 19 tracts. I don't know that I took them over to Garden Valley at that time; I took them over the valley generally but I am not sure we went to Garden Valley. That was during that visit; Mrs. Hart had not been there during any other visit to my knowledge prior to that. At that time Mr. Hart expressed satisfaction with the way the trees were growing and doing, outside of the peach trees; we were all disappointed that the peach trees didn't do good on these lots.

I have no knowledge of the fact as to who Mr. and Mrs. Hart went out to the lots with. It is possible they went out alone.

I talked with them about their lots at the time. There wasn't a great deal said except that he expressed satisfaction in regard to them. I can't remember his remarks, just in a general way as to what he said. There was no complaint; they seemed to be pleased with their investment and pleased with the growth the apple trees had made. Mr. Hart instructed me to substitute pear for peaches, while on that visit. I don't know how long it extended, but he got there sometime during the month

1 (Testimony of B. L. Eddy.)

of February. I don't remember that we ever had any communication from Mrs. Peterson relative to doing anything of that kind.

B. L. EDDY

A witness on behalf of defendants, testified as follows:

### DIRECT EXAMINATION.

I was trustee for the owners of Plat D only; I had nothing to do with the Harding Land Company, except representing the owners of Plat D.

I have met Glenn D. Hart here. I think the only time I met Mr. Hart was in my office at Roseburg. I couldn't state when, but I am quite sure it was after a letter which he wrote me, which was introduced in evidence here, which was written from Dakota; some months after that he came into my office, and was probably brought in by somebody from the Harding Land Company. My recollection is that that letter was written in June, 1912; it is in evidence here. I had some conversation with him about Mr. and Mrs. Hart's tracts; that was his object in coming; he came to see me about these payments as I had given him two or three notices to pay. The gist of his conversation was that he was short of money and would take care of it later. He made no proposition of dissatisfaction with the lots at all.

(Testimony of Glenn D. Hart.)

**GLENN D. HART,**

Recalled in rebuttal by plaintiff, testified as follows:

**DIRECT EXAMINATION.**

I heard the testimony of Mr. Zercher. I have met him at Roseburg. I never had a conversation with him regarding these lots, and he was never present at any time I was talking with Mr. Harding about them.

I heard the testimony in regard to my authorizing him to plant pears and will say that I never authorized him to plant pears on these tracts and never talked to him about pears that I ever remember, or authorized him at any time to plant pears on the Peterson tract that I ever remember.

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**THAT AFTERWARDS**, to-wit, on the 19th day of October, 1914, the Honorable R. S. Bean, District Judge, before whom this cause was tried, rendered the following oral opinion which was thereafter duly filed in said Court and Cause, and which is in words and figures as follows, to-wit:

The case of Hart v. the Harding Land Company, et al., was a suit brought in this court to set aside three contracts entered into between the plaintiff and her assignors, and the Harding Land Company for the purchase of certain lands in Douglas County. It appears from the testimony that some time prior to 1910, the

individual defendants, Adair and others, purchased a tract of land consisting of about 400 acres near Wilbur in Douglas County, with the understanding that the land should be divided by the Harding Land Company into small tracts and sold as fruit land, that the proceeds of the sale should be appropriated, as I recall the testimony, to the reimbursing of the individual defendants for the amount they had paid on the purchase price of the property and to take care of a mortgage that they gave for deferred payments, and the balance should be divided between the parties in a certain manner immaterial to the questions now involved. The Harding Land Company thereupon proceeded to divide this land into small tracts and put it on the market as fruit land. As customary, or not unusual—perhaps not customary but not unusual in such corporations—it proceeded to offer this land for sale outside of the State of Oregon, and to people who were not familiar with the locality. It had an agent who made sales in Dakota and Colorado, and he sold or contracted to sell to the plaintiff and her assignors one each of the ten-acre tracts of land for \$350.00 an acre, under an agreement with the Land Company to set the land out to fruit trees, apples and peaches, to cultivate it for three years, and to turn it over at the end of the three years to the purchasers in good condition. The plaintiff alleges that to induce them to enter into this contract this agent represented to them that this land was worth \$350.00 an acre, that it was choice orchard land, that it had been examined by an expert orchardist and that the result of such examination showed that it was peculiarly adapted to the growing of

fruit trees, that the soil was sandy loam and easily cultivated, well drained and needed no irrigation. At the same time he exhibited to these intending purchasers some literature issued by the company, in which it was stated that the peach trees were to stay between the rows of apple trees until they crowded them out, and that they were planted because in the Umpqua Valley this crop practically never failed, that peaches began to yield in three years, two or three boxes from each tree the third season, producing so prolifically as to provide an income sufficient for a living and enough in addition to make the payments on the purchase price of the land. The plaintiff, relying upon these statements, entered into the contract and made the first payment. While they were negotiating they suggested that probably they should come to Oregon and see the land before closing the contract but they were assured that was unnecessary, that they could rely upon the statements of the agents and representations of the company, and that the expense of a trip to Oregon would be useless. Relying upon these statements, they entered into these contracts and made the first payments. Some two or three years later they came to Oregon, did not find the land in the condition they expected to and brought this suit to set aside these contracts on the ground of fraud.

Now, I am not going to attempt to review the testimony in this case. It is sufficient that in my judgment the allegations of the complaint are sustained. It is admitted by the defendants that the land is not suitable to growing peaches and that the peach trees died, and that was one of the material inducements evidently op-

erating on the minds of these purchasers to persuade them to enter these contracts, the fact that, as represented, in three years at the time the contract expired and they received the land, the peach trees would be bearing fruit sufficient to make the subsequent payments, and this is admitted to have been untrue and the land wholly unsuited to growing peaches. There is a great conflict in the testimony as to whether the land was suitable for apple growing. Two gentlemen, one of them the agriculturist of Lane County, visited this property, made a physical examination, and each of them testified that in his judgment it was not suitable for apple growing. The evidence shows that it is a fine clay soil, largely impervious to water, not easily cultivated and is not the general character of land which one would expect to be exploited for orchard purposes.

The defendant produced a good many witnesses to testify that in their opinion it would produce good orchards, but it was a striking feature in the case that no witness was produced who testified that he knew of any profitable commercial orchards growing in Douglas County on such land. And, under the circumstances of this case I think, in the first place, that where exploiting companies make representations of this kind to intending purchasers outside the state and persuade them not to examine the land, they ought to be held to strict accountability, and the judgment of this court is that the plaintiff is entitled to a decree setting these contracts aside, and a judgment against the Land Company for the money they have paid on them, and for the costs of this proceeding.

AND AFTERWARDS, to-wit, on the 9th day of November, 1914, the Honorable R. S. Bean, District Judge, before whom this cause was tried, rendered the following supplemental oral opinion, which was thereafter duly filed in said Court and Cause and which is in words and figures as follows, to-wit:

The case of Hart vs. Harding Land Company was tried and determined some time ago and a decree ordered entered against the Land Company and in favor of the plaintiff, setting aside certain contracts and requiring the Land Company to repay the plaintiff money paid thereon. A motion was made to have the decree include the owners of the land which the Land Company agreed to sell to the plaintiffs, but I do not think that under the facts and law in the case a personal judgment should go against the land owners for the money received by the Land Company on this contract of sale. The contract was made between the plaintiffs and the Land Company and the owners of the land were not parties to it; they are not disclosed as interested in the matter in any shape, manner or form; there was no contract between them and Mrs. Hart or her assignors and I can see no reason, under the circumstances in this case, why they should be now required to pay back the money that was received from Mrs. Hart and her assignors, by the Land Company under the false and fraudulent representations made.

. . . . .

IT IS HEREBY STIPULATED and AGREED by and between the parties hereto, by their respective counsel, that the foregoing is a statement of the case showing how the questions arose and were decided in the District Court of the United States for the District of Oregon, and setting forth so much only of the facts alleged and proved or sought to be proved, as is essential to a decision of such questions by the Circuit Court of Appeals for the Ninth Circuit, and that the same <sup>when</sup> ~~were~~ filed with the Clerk of the District Court of Oregon and approved by said District Court or the Judge thereof, shall be treated as superseding for the purposes of the appeal, all parts of the record in this Cause other than the decree from which the appeal is taken, and together with such decree shall be copied and certified to the Circuit Court of Appeals for the Ninth Circuit as the record on appeal.

And it is FURTHER STIPULATED and AGREED that the Clerk of the District Court shall transmit to the Clerk of the Circuit Court of Appeals, the original of the following exhibits introduced in evidence, the same to be regarded as constituting a portion of the record on appeal, as follows, to-wit:

Plaintiff's Exhibits D-1, D-2, D-3, D-4, D-5, D-6, D-7, and D-8 respectively, and

Defendants' Exhibits 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 respectively.

Portland, Oregon, August 17, 1915.

E. A. Lundburg,  
Counsel for Appellants Hart.

O. P. Coshow,  
Counsel for Appellant  
W. C. Harding Land Company.

B. L. Eddy,  
Counsel for Respondents Adair,  
Epperly, Burns, Green and Wallace.

PURSUANT TO and in ACCORDANCE  
WITH the foregoing stipulation between the parties  
hereto, dated August 17, 1915, the foregoing statement  
of the case IS HEREBY APPROVED.

And PURSUANT to said stipulation it is OR-  
DERED that the original Exhibits introduced in evi-  
dence in this Cause and described in said stipulation shall  
be transmitted to the Clerk of the Circuit Court of Ap-  
peals as a part of the Record on Appeal.

Dated August 23, 1915.

R. S. Bean,  
Judge.

Filed August 23, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 9th day of  
November, 1914, the same being the 7th judicial day of  
the regular November term of said Court; Present, the  
Honorable Robert S. Bean, United States District

Judge presiding, the following proceedings were had in said cause, to-wit:

### FINAL DECREE.

This cause came on to be heard at this term of Court on the pleadings filed and evidence taken herein, and was argued by counsel; and thereupon, upon consideration thereof, it was Ordered, Adjudged and Decreed as follows, viz.:

First; That the purchase of Lot Eighteen (18) of Plat "D" of Roseburg Home Orchard Tracts, Douglas County, Oregon, and the said contract therefore dated March 24, 1910, entered into between Mrs. Glenn D. Hart and the W. C. Harding Land Company, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect, and

That plaintiffs do have and recover of and from the W. C. Harding Land Company the money advanced in payments on said purchase and on account of said contract; the sum of Seven Hundred Dollars, with interest thereon at the rate of six per cent. per annum from the 24th day of March, 1910, until paid, and for the further sum of Three Hundred Fifty Dollars, with interest thereon at the rate of six per cent per annum from June 2, 1911, until paid, and for the further sum of Four Hundred Dollars, with interest thereon at the rate of six per cent per annum from April 16, 1912, until paid, and for the further sum of Eight and seventy five one-hundredths Dollars, with interest thereon at the rate of six

per cent per annum from April 3, 1911, until paid, and for the further sum of Eight and seventy five one-hundredths Dollars, with interest thereon at the rate of six per cent per annum from April 3, 1912, until paid:

Second: That the purchase of Lot Nineteen (19) of Plat "D" of Roseburg Home Orchard Tracts, Douglas County, Oregon, and the said contracts therefor, dated March 24, 1910, entered into between Glenn D. Hart, and the W. C. Harding Land Company, and thereafter duly assigned under date of April 23, 1912, to Mrs. Glenn D. Hart, by said Glenn D. Hart, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect, and

That plaintiffs do have and recover of and from the said W. C. Harding Land Company the money advanced in payments on said purchase and on account of said contract, the sum of Seven Hundred Dollars with interest thereon at the rate of six per cent per annum from the 24th day of March, 1910, until paid, and the further sum of Seven Hundred Dollars with interest thereon at the rate of six per cent per annum from the 2nd day of June, 1911, until paid, and for the further sum of Eight and seventy-five one-hundredths Dollars with interest thereon at the rate of six per cent per annum from April 3, 1911, until paid, and for the further sum of Eight and seventy-five one hundredths Dollars with interest thereon at the rate of six per cent per annum from April 3, 1912, until paid;

Third: That the purchase of Lot Seventeen (17) of Plat "D" Roseburg Home Orchard Tracts, Douglas

County, Oregon, and the said contract therefor, dated October 15, 1910, entered into between Mrs. Ella Peterson and the W. C. Harding Land Company, and thereafter duly assigned under date of ..... to Mrs. Glenn D. Hart, by said Mrs. Ella Peterson, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect;

That plaintiffs do have and recover of and from the W. C. Harding Land Company, the money advanced in payments on said contract, the sum of One Hundred Dollars with interest thereon at the rate of six per cent per annum from April 15, 1910, until paid, and for the further sum of Three Hundred Dollars with interest thereon at the rate of six per cent per annum from May 15, 1910, until paid, and for the further sum of Four Hundred Dollars with interest thereon at the rate of six per cent per annum from November 1, 1910, until paid, and for the further sum of Twenty-five Dollars, with interest thereon at the rate of six per cent per annum from December 1, 1910, until paid; and for the further sum of Twenty-five Dollars with interest at the rate of six per cent per annum from Jan. 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Feb. 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from March 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from April 1, 1911, until paid; and for the further sum of Twenty-five Dollars,, with interest at the rate of six per cent per

annum from May 1, 1911, until paid; and for the further sum of Twenty-five Dollars with interest at the rate of six per cent per annum from June 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from July 1, 1911, until paid; and for the further sum of Twenty-five Dollars with interest at the rate of six per cent per annum from Aug. 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Sept. 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Oct. 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Nov. 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Dec. 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Jan. 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Feb. 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from March 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from April 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from May 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum

from June 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from July 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Aug. 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Sept. 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Oct. 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Nov. 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Dec. 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Jan. 1, 1913, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Feb. 1, 1913, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from March 1, 1913, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from April 1, 1913, until paid; and for the further sum of Fifty Dollars with interest thereon at the rate of six per cent per annum from May 1, 1913, until paid; and for the further sum of Eight and forty-nine one-hundredths Dollars with interest thereon at the rate of six per cent per annum from April 3, 1911, until paid;

Fourth: That in addition to the total of said respective sums of money with interest thereon as set out, to-wit, \$5473.81; that plaintiffs further do have and recover of and from the said W. C. Harding Land Company, their costs and disbursements incurred in this suit, taxed at \$135.60, for which execution will issue.

Dated at Portland, Oregon,  
November 9th, 1914.

R. S. Bean, Judge.

Filed November 9, 1914, G. H. Marsh, Clerk.

And afterwards, to-wit, on the 14th day of April, 1915, there was duly filed in said court and cause a petition of plaintiffs for appeal in words and figures as follows, to-wit:

#### PETITION OF PLAINTIFFS FOR APPEAL.

To the Honorable R. S. Bean, District Judge, the  
Judge before whom said cause was tried:

The above named plaintiffs, Mrs. Glenn D. Hart and Glenn D. Hart, conceiving themselves aggrieved in part by the decree made and entered herein on the 9th day of November, 1914, in the above entitled cause, do hereby appeal from said decree and order to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith and they pray that the appeal may be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and

papers on which said decree was made, duly authenticated, may be sent to the United States Circuit Court of appeals for the Ninth Circuit.

E. A. Lundburg,  
Attorney for Plaintiffs.

And now, to-wit: On April 14, 1914, it is ordered that the appeal be allowed as prayed for.

R. S. Bean,  
District Judge.

Filed April 14, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 14th day of April, 1915, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, to-wit:

### ASSIGNMENT OF ERRORS.

Comes now the plaintiff and assigns the following errors by the Court in the decree herein entered November 9th, 1914, to-wit:

#### I.

In failing to decree that plaintiff was entitled to have relief against the individual defendants, Walter Adair, J. T. Epperly, James B. Burns, F. S. Green and L. B. Wallace, owners of the land involved, as prayed for in the bill of complaint.

II.

In failing to include in the decree a personal judgment against the individual defendants, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, for the return of the money paid on each of the several contracts issued by the W. C. Harding Land Company to the plaintiff and her assignors.

III.

In over-ruling plaintiff's motion to include in the decree when entered, a personal judgment for \$5473.81 against Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, the individual defendants.

IV.

In failing to enter a decree granting plaintiff relief against all of the defendants as prayed for in the complaint.

V.

In failing to enter a decree broad enough to grant to plaintiff all of the relief to which she is entitled under the law and the evidence.

WHEREFORE, the plaintiff prays for the correction of the foregoing errors and that the decree be modified accordingly and that plaintiff be granted relief according to the prayer of her complaint.

A. E. Lundburg,  
Attorneys for Plaintiffs.

Filed April 14, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 19th day of April, 1915, there was duly filed in said Court and cause a Bond of Plaintiffs on Appeal in words and figures as follows, to-wit:

### BOND ON APPEAL.

Know all men by these presents, That we, Mrs. Glenn D. Hart and Glenn D. Hart and National Surety Company of New York are held and firmly bound unto Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace in the sum of two hundred and fifty dollars, to be paid to the said Walter Adair, J. P. Epperly, James P. Burns, F. S. Green and L. B. Wallace, executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by, these presents.

Sealed with our seals, and dated April 19, 1915.

Whereas, the above named Mrs. Glenn D. Hart and Glenn D. Hart have appealed to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the . . . . . in the above entitled cause by the District Court of the United States for the District of Oregon.

Now, therefore, the condition of this obligation is such, that if the above named Mrs. Glenn D. Hart and Glenn D. Hart shall prosecute said appeal to effect, and answer all costs, if he shall fail to make good his

plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Mrs. Glenn D. Hart,

Glenn D. Hart,

By E. A. Lundburg, their Attorney in Fact.

Signed, sealed and delivered in presence of:

(Seal, National  
Surety Company)

National Surety Company,

By Jas. McI. Wood,  
Its Attorney in Fact.

Subscribed and sworn to before me this. . . . . 189..

Filed April 19, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 28th day of April, 1915, there was duly filed in said court, and cause, a Petition of W. C. Harding Land Company for Appeal, in words and figures as follows, to-wit:

### PETITION FOR APPEAL.

To the Honorable R. S. Bean, District Judge:

The above named defendant W. C. Harding Land Company, a corporation, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 9th day of November, A. D. 1914, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the Assignment of Errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record pro-

ceedings and documents upon which said decree was based duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

W. C. Harding Land Company,  
By O. P. Coshow, its Attorney.

State of Oregon,  
County of Multnomah—ss.

We hereby accept service of the foregoing Application for an Appeal in said County and State and hereby waive the issuance and service of a Citation in said Appeal this 28th day of April, A. D. 1915.

E. A. Lundburg,  
Attorney for Plaintiffs.

B. L. Eddy,  
Attorney for Defendants Walter Adair, J. T. Epperly,  
James P. Burns, F. S. Green and L. B. Wallace.

Appeal allowed this April 28, 1915, and bond fixed at \$250.00.

R. S. Bean,  
Judge.

Filed April 28, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 28th day of April, 1915, there was duly filed in said Court and cause, an Assignment of Errors in words and figures as follows, to-wit:

## ASSIGNMENT OF ERRORS.

Now comes the above named defendant W. C. Harding Land Company, a corporation, in the above entitled cause and filed the following Assignment of Errors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the decree made in this Honorable Court on the 9th day of November, 1914:

### I.

That the United States District Court for the District of Oregon erred in decreeing the following, to-wit:

First: That the purchase of lot eighteen (18) of Plat D of Roseburg Home Orchards Tracts, Douglas County, Oregon, and the said contract therefor dated March 24, 1910, entered into between Mrs. Glenn D. Hart and the W. C. Harding Land Company, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect.

### II.

In decreeing that the plaintiffs have and recover off and from the W. C. Harding Land Company the money advanced in the payments on the purchase contract mentioned in the Assignment of Erros No. 1 herein.

## III.

Second: That the purchase of lot Nineteen (19) of Plat D of Roseburg Home Orchard Tracts, Douglas County, Oregon, and the said contract therefor, dated March 24, 1910, entered into between Glenn D. Hart and the W. C. Harding Land Company, and thereafter duly assigned under date of April 23, 1912, to Mrs. Glenn D. Hart by said Glenn D. Hart, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect.

## IV.

In decreeing that the plaintiffs have and recover from the said W. C. Harding Land Company, defendant, the money advanced in payments on said purchase and on account of said contract mentioned in Assignment of Error No. 3 herein.

## V.

Third: That the purchase price of lot 17 of Plat D of Roseburg Home Orchard Tracts, Douglas County, Oregon, and said contract therefor, dated October 15, 1910, entered into between Mrs. Ella Peterson and the W. C. Harding Land Company, and thereafter duly assigned under date of . . . . . to Mrs. Glenn D. Hart, by said Mrs. Ella Peterson, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect.

VI.

In decreeing that plaintiffs have and recover off and from the W. C. Harding Land Company the money advanced in payments on said contract and purchase mentioned in Assignment of Error No. 5 herein.

VII.

Fourth: In rendering a decree and judgment in favor of plaintiff for the sum of \$5473.81 and for plaintiffs' costs and disbursements taxed at——.

VIII.

In not rendering a decree in favor of the defendant W. C. Harding Land Company and against the plaintiffs, and dismissing plaintiffs' Bill in Equity.

IX.

In not rendering and entering a judgment in favor of the defendant W. C. Harding Land Company and against the plaintiffs for the costs and disbursements incurred by said W. C. Harding Land Company in the trial of the above entitled cause.

WHEREFORE, the appellant prays that said decree be reversed and that said District Court for the District of Oregon be ordered to enter a decree reversing the decision of the lower court in said cause.

O. P. Coshow,

Attorney for W. C. Harding Land Company, Appellant.

Filed April 28, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 6th day of May, 1915, there was duly filed in said Court and cause, a Bond on Appeal in words and figures as follows, to-wit:

### BOND ON APPEAL.

Know all men by these presents, That we, W. C. Harding Land Company, a corporation, as principal and The American Surety Company of New York, a corporation, as surety, are held and firmly bound unto Mrs. Glenn D. Hart and Glenn D. Hart, the above named plaintiffs in the full sum of Two Hundred (250) Dollars, to be paid to the said plaintiffs, their heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with out seals and dated this 5th day of May in the year of our Lord Nineteen Hundred and Fifteen.

Whereas, the above named W. C. Harding Land Company has prosecuted an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit to reverse the decree of the District Court for the District of Oregon, in the above entitled cause.

Now, therefore, the conditions of this obligation are such that if the above named W. C. Harding Land Company shall prosecute its said appeal to effect and answer all costs if it fails to make good its plea, then this obliga-

tion shall be void, otherwise to remain in full force and effect.

W. C. Harding Land Company,  
By O. P. Coshow, its Attorney.

Attest:

Sylvia J. Brown,  
Assistant Secretary.

(Seal)

American Surety Company of New York,  
By W. J. Lyons,  
Resident Vice President.

(Seal)

Attest by

N. A. King,  
Resident Asst. Secretary.

W. J. Lyons,  
Agent.

Approved by

R. S. Bean,  
Judge.

Filed May 6, 1915. G. H. Marsh, Clerk.

UNITED STATES OF AMERICA,  
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on appeal in the case in said Court in which Mrs. Glen D. Hart and Glen D. Hart are plaintiffs and appellants, and the W. C. Harding Land Company, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace are defendants, and the said Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace are appellees, and in which the said the W. C. Harding Land Company, defendant, is appellant, and the said Mrs. Glen D. Hart and Glen D. Hart are appellees, in accordance with the law and rules of this Court, and in accordance with the stipulations of the parties filed in said cause, and that said record is a full, true and correct transcript of the record and proceedings had in said Court in said cause in accordance with the said stipulations, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript of record is \$\_\_\_\_\_ for clerk's fees for preparing the said transcript, and \$\_\_\_\_\_ for printing said transcript, and that \$\_\_\_\_\_ of said cost has been paid by the said appellants, Mrs. Glen D. Hart and Glen D. Hart, and \$\_\_\_\_\_ of said costs has been paid by said appellant, the W. C. Harding Land Company.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this ——— day of November, 1915.

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Clerk.



IN THE  
UNITED STATES CIRCUIT  
COURT OF APPEALS  
FOR  
THE NINTH CIRCUIT

MRS. GLENN D. HART and GLENN D. HART, Appellants,

vs.

WALTER ADAIR, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, Appellees.

and

W. C. HARDING LAND COMPANY, a Corporation, Appellant,

vs.

MRS. GLENN D. HART and GLENN D. HART, Appellees.

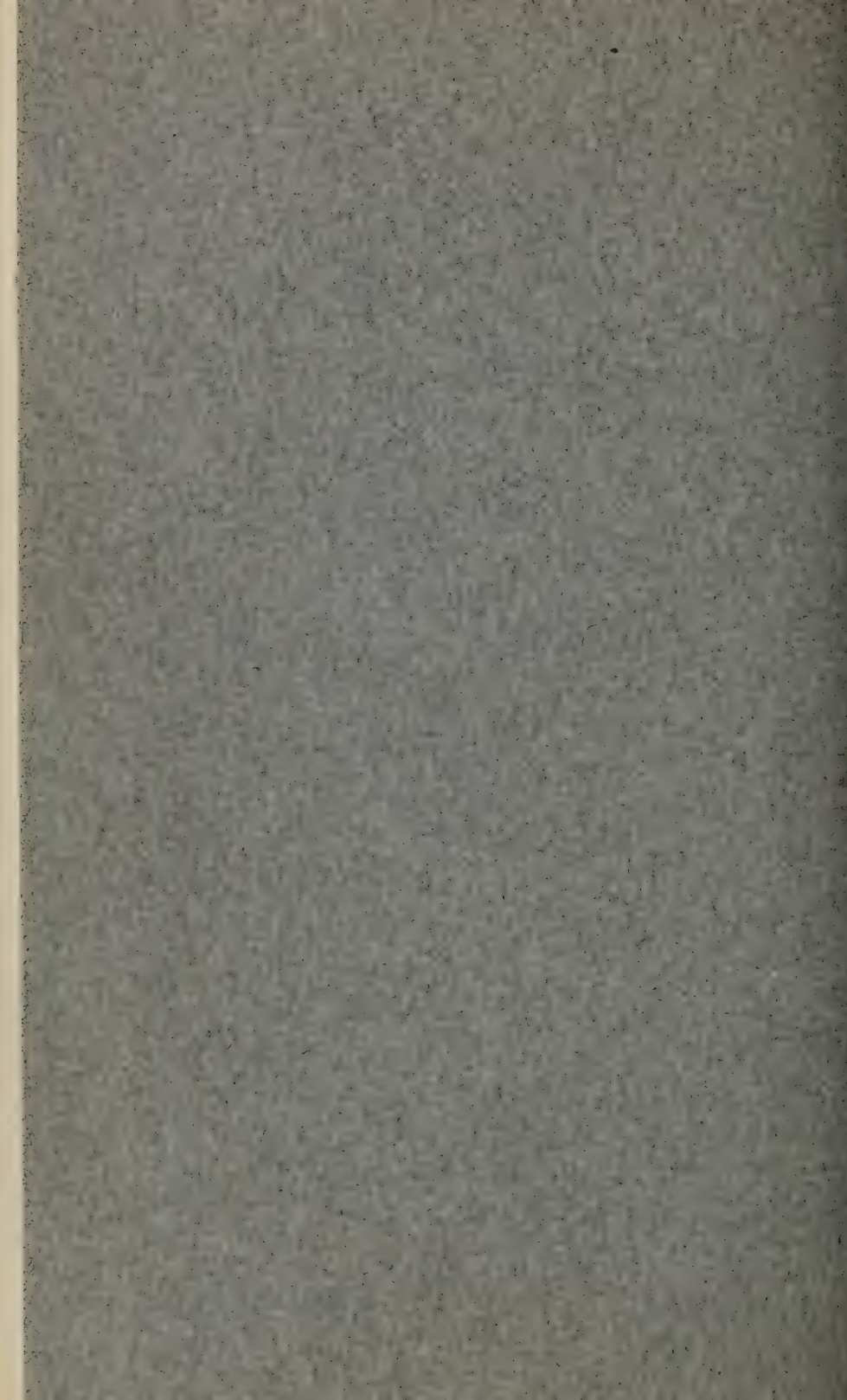
**BRIEF FOR APPELLANT W. C. HARDING  
LAND COMPANY.**

On Appeal From the District Court of the United  
States for the District of Oregon.

O. P. COSHOW, Attorney for Appellant W. C.  
Harding Land Company.

Filed

JAN 26 1916





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IN THE  
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**BRIEF FOR APPELLANT W. C. HARDING  
LAND COMPANY.**

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**On Appeal From the District Court of the United  
States for the District of Oregon.**

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O. P. COSHOW, Attorney for Appellant W. C.  
Harding Land Company.

### **STATEMENT OF THE CASE.**

The Appellees Mrs. Glenn D. Hart and her husband, Glenn D. Hart, filed their Bill of Complaint in the District Court for the District of Oregon on March 9th, 1914, suing for rescission of certain land contracts, the Bill being based upon three alleged causes of suit. First, Mrs. Glenn D. Hart sued as purchaser from the Appellant W. C. Harding Land Company of a tract of Land known as lot number 18 of Flat "D" of Roseburg Home Orchard Tracts, containing 10 acres, in Douglas County, Oregon, at the purchase price of \$3500.00, of which \$700.00 was paid in cash and the balance was to be paid in installments as shown by a written contract of sale. It is alleged in the Bill that the land was owned, at the time of the making of the contract by Appellee's Walter Adair, J. T. Epperly, James P. Burns, F. S. Green, and L. B. Wallace, who are sometimes referred to in the Record as the "land owners," all of whom, save Wallace, are farmers. The platted land was a part of a larger tract which the land owners had purchased, and under a contract between them and the W. C. Harding Land Company the latter was to divide the land into orchard tracts and plat the same and place it upon the market. Under the contract between the W. C. Harding Land Company and the land owners the latter were to have \$200.00 an acre for the land, and the Harding

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Land Company sold the lots in its own name and also made agreements with purchasers to plant the land to fruit trees and care for the same for a period of three years. The land owners were not in any way known in the contracts which the Harding Land Company made for the sale, planting or cultivation of the lands, but such contracts were all made in the name of the W. C. Harding Land Company.

Plaintiff sues for rescission of contract and for the recovery of the installments of purchase prices which had been paid, (the full purchase price never having been paid), on the ground of fraudulent misrepresentations as to the character and value of the land made by the agent of the Harding Land Company at the time of the making of the contract of sale. Plaintiff for a second cause of suit alleges the making of a like contract by the W. C. Harding Land Company with her husband Glenn D. Hart, for the sale of lot 19 of the same plat, containing 10 acres, for the purchase price of \$3500.00, of which part was paid in cash, and some later installments paid, but the land was not paid for in full, and it is alleged and proven that on April 23rd, 1912, the said Glenn D. Hart "for a valuable consideration assigned to plaintiff all his right, title and interest, claim or demand in and to said contract." The same fraudulent representations are alleged to have been made by an agent of the Harding Land Company in the sale of

this tract, and plaintiff as assignee asks for rescission of contract and return of the purchase money paid, with interest.

The third alleged cause of suit is based upon a similar transaction in which the Harding Land Company made a contract with one Ella Peterson to sell to her lot 17 of the same plat containing 10 acres, for \$3500.00, of which part only of the purchase price was paid, and it is alleged that prior to the institution of this suit said Ella Peterson, "for a valuable consideration, assigned to plaintiff all her right, title and interest, claim or right of action in and to said contract." Like fraudulent misrepresentations are claimed as to the contract made with Mrs. Peterson, and rescission of contract and return of the purchase money paid with interest is prayed for by plaintiff as assignee of Ella Peterson.

The W. C. Harding Land Company was engaged in planting and selling commercial orchard lands in various parts of the county, and represented that its lands were first-class apple lands, and also that peach trees would yield a more immediate profit if planted as "fillers" among the apple trees. Its contract of sale as to each lot provided that it should "plant said tract to apples of the same commercial varieties as planted in the entire plat, as follows: Spitzenbergs and Newton Pippins with peach trees fills not less than forty six to the acre," and it was to

give thorough cultivation and care for three years, and then deliver the orchard to the purchaser.

As to all the tracts it is alleged by plaintiff that the land was not worth to exceed \$50.00 per acre and that it is valuable only for ordinary farm purposes when drained by tiling; that it lies very low; is bottom land and in a swale; that during the high water in the rainy season, the nearby creek overflows and sweeps over part of the land during the winter months; that the surface soil is of a stiff, black, sticky substance, while the subsoil is a sort of "joint clay" and very tough and of the nature of hardpan, through which water does not soak or drain; that the soil is not adapted for orchard purposes and is entirely unfit for the growing or production of apples, or peaches, etc.

The Appellant W. C. Harding Land Company admits the making of the respective contracts of sale, the payment of the installments of purchase price as allaged, but denies all fraudulent representations, denies the allegations tending to show that the land is of poor quality, or not adapted to fruit growing and alleges affirmatively that the land is of a deep, rich, fertile nature, and when properly cultivated, is very productive of practically all kinds of vegetables, cereals and fruits grown in the Umpqua Valley, in which the land is situated. And it is claimed that the land is especially adapted to apple-growing.

As shown by the contracts of sale the Harding Land Company agreed with the respective purchasers to plant the lots to apple trees and to also set between the apple trees peach trees known as "fillers," the object being that after the apple trees had reached a certain stage of growth the peach trees would be removed, the intention being to grow upon the tracts apple orchards. It is claimed by plaintiff that at the time of the making of the contracts of sale the agent of the Harding Land Company represented, chiefly by way of printed literature, that upon the apple lands which the Company was selling, peach trees could be planted and yield a profit because of their earlier maturity, while waiting for the apple trees to come into bearing.

The Harding Land Company planted the tracts in question, in accordance with the contracts of sale, to apple trees, with peach tree "fillers," and as required by its contract cared for the trees for three years, at which time it relinquished the tracts to the purchasers. It appeared at the time of the trial that the tracts in question were not in good condition, and this was due to the fact that the respective purchasers had not properly cultivated or cared for the same after the expiration of the stewardship of the Harding Land Company. In the case of the two lots sold to Glenn D. Hart and Mrs. Glenn D. Hart, the purchasers, after the expiration of the three year

period covered by the Harding Land Company's contract, had expressly accepted the lands and caused cultivation to be done by one Carvalho for them. In the case of the tract sold to Ella Peterson, there had been no cultivation or care after the expiration of the stewardship of the Harding Land Company.

The Harding Land Company admitted in the pleadings and upon the trial that the peach trees planted upon these particular tracts had not done as well as peach trees planted on other tracts which it had handled in the same county, and claims, as shown by the evidence, that purchasers were informed of the fact that the peach trees were not thriving and each entered into an agreement with the Harding Land Company that it should substitute pear trees for the peach trees. In the case of the lots sold to Glenn D. Hart and Mrs. Glenn D. Hart, this substitution was fully effected and carried out by the Harding Land Company, but in the case of Ella Peterson, while there was an agreement to substitute pear trees instead of peach trees, this had not been carried out at the time the suit was filed.

The Harding Land Company claims that not only was the land first-class and thoroughly adapted to apple-growing, which was the chief object in view, but that it employed the best experts and the

best methods of planting, cultivation and care, and at the expiration of the three-year period during which it was required to care for the trees, it turned over to the respective purchasers first-class young orchards, strictly in accordance with the contracts as modified, except that in the case of the tract of Mrs. Peterson a minute quantity of the lot was covered by a log and some brush which the employees of the Harding Land Company had failed to remove, and the filing of the suit before the arrival of a suitable season to plant the pear trees prevented the actual planting of such trees in place of the peach trees on the lot of Mrs. Peterson.

The evidence shows that Glenn D. Hart, the husband of the plaintiff, acted for her, having purchased the lot which was purchased in her name, and also the lot contracted for in his name, and transacted all business with the Harding Land Company with respect to said lots; and it also appears from the evidence that within a few months after the purchase of the lots Glenn D. Hart, husband of the plaintiff, became a stockholder, vice-president, director, and sales manager of the Harding Land Company, and was fully conversant with all its affairs, and not only had every opportunity to inspect the lots in question, but did inspect the same repeatedly during the years 1911 and 1912, and never made complaint to any person until just prior to the suit, that either

he or his wife had been in any way defrauded; that when he was informed that the peach trees were not thriving, he expressly agreed with the Company that pear trees should be substituted; that he applied on more than one occasion, for an extension of time to make payments on the lots as required by the contracts, after full inspection and personal knowledge of the lots; that thereafter he accepted the lots from the Company at the expiration of the Company's stewardship of three years and caused a contract to be made with a third party to care for the lots thereafter for himself and wife. As to all the contracts, Appellant claims such ratification and affirmance as precludes rescission.

It is further claimed on behalf of Appellant Harding Land Company that plaintiff can maintain no suit upon the contracts made with her assignors Glenn D. Hart, and Ella Peterson, because the assignments either affirm the contracts, so as to preclude rescission, or the plaintiff is claiming assignments of mere litigious rights which cannot be assigned.

The lots were purchased in the spring of 1910, or nearly four years before the filing of this suit.

The plaintiff sought to hold the Appellee's Adair, Epperly, Burns, Green and Wallace liable for the alleged fraudulent representations, jointly with the Harding Land Company, and sought judgment against said land owners for the installments of

purchase money and interest which had been paid to the Harding Land Company.

The District Court entered a decree in favor of plaintiff and against the Harding Land Company rescinding the contracts in question and awarding judgment for the installments of purchase money which had been paid, together with interest, but refused to enter any decree against the Appellee's Adair, Epperly, Burns, Green and Wallace, on the ground that they were not in any way connected with the sales contracts and were not known in the transactions in question. This Appellant takes no exception to the relieving of Appellees Adair, et al, from liability, as they had nothing to do with making the contracts in question.

### **SPECIFICATIONS OF ERROR.**

The errors assigned and now urged are:

#### **I.**

That the United States District Court for the District of Oregon erred in decreeing the following, to-wit:

First: That the purchase of lot eighteen (18) of Plat D of Roseburg Home Orchard Tracts, Douglas County, Oregon, and the said contract therefor dated

March 24th, 1910, entered into between Mrs. Glenn D. Hart and the W. C. Harding Land Company, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect.

## II.

In decreeing that the plaintiffs have and recover off and from the W. C. Harding Land Company the money advanced in the payments on the purchase contract mentioned in the Assignment of Errors No. 1 herein.

## III.

Second: That the purchase of lot Nineteen (19) of Plat D of Roseburg Home Orchard Tracts, Douglas County, Oregon, and the said contract therefor, dated March 24th, 1910, entered into between Glenn D. Hart and the W. C. Harding Land Company, and thereafter duly assigned under date of April 23rd, 1912, to Mrs. Glenn D. Hart, by said Glenn D. Hart, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect.

## IV.

In decreeing that the plaintiffs have and recover from the said W. C. Harding Land Company, defendant, the money advanced in payments on said purchase and on account of said contract mentioned in Assignment of Error No. 3 herein.

## V.

Third: That the purchase price of lot 17 of Plat D of Roseburg Home Orchard Tracts, Douglas County, Oregon, and said contract therefor, dated October 15th, 1910, entered into between Mrs. Ella Peterson and the W. C. Harding Land Company and thereafter duly assigned under date of ..... to Mrs. Glenn D. Hart, by said Mrs. Ella Peterson, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect.

## VI.

In decreeing that plaintiffs have and recover off and from the W. C. Harding Land Company the money advanced in payments on said contract and purchase mentioned in Assignment of Error No. 5 herein.

## VII.

Fourth: In rendering a decree and judgment in favor of plaintiff for the sum of \$5473.81 and for plaintiffs' costs and disbursements taxed at .....

## VIII.

In not rendering a decree in favor of the defendant W. C. Harding Land Company and against the plaintiffs, and dismissing plaintiffs' Bill in Equity.

## IX.

In not rendering and entering a judgment in favor of the defendant W. C. Harding Land Company and against the plaintiffs for the costs and disbursements incurred by said W. C. Harding Land Company in the trial of the above entitled cause.

### ARGUMENT.

#### Discussion of Facts.

The suit is based upon alleged misrepresentation in the sale of the three tracts of land in question. The position of this appellant is that the evidence shows:

First: That there was no fraudulent misrepresentation whatever but that the lots consist of deep, fertile soil, thoroughly adapted to apple growing, which was the chief object in view on the part of the purchasers, though not so well adapted to peach growing, but the peach trees were only intended as a temporary planting on the land;

Second: That the mistake as to the peach trees was an honest one and was corrected by supplemental agreements between the parties concerned for the substitution of pear trees for the peach trees;

Third: That after full knowledge of the lands

the respective purchasers ratified and affirmed the contracts;

Fourth: And as to the lots contracted to plaintiff's assignors Glenn D. Hart and Ella Peterson, the contracts were affirmed by the very assignments under which plaintiff claims as to those contracts, and therefore rescission is impossible as to them.

We discuss first the facts as to the character of the land.

### **Facts as to the Quality of the Land.**

The plaintiffs relied upon the trial chiefly upon the testimony of L. J. Chapin, County Agriculturist of Marion County, and F. W. Rader, Agriculturist for Lane County. These were two young men, not many years out of college, who had taken college courses in agriculture, but had not taken courses in horticulture, had no practical knowledge worth mentioning of fruit trees, knew nothing about the growing of fruit trees in the locality in question. They claimed to have taken samples of the soil but brought no samples into court, and the only examination they had made of it was by looking at it with eye. They had a theory that such soil is worth \$50.00 per acre for agricultural purposes, that it is not good for fruit, that it is impervious to water, etc.

In fixing their valuation it did not seem to make any difference to them where the soil might be located with reference to transportation, accessibility to markets, and so on. In other words it needs no expert to see from their testimony that they were spinning a web of speculation out of a few theoretical notions obtained in college. There is one remarkable and outstanding feature of their testimony that condemns what they said. All the testimony shows that the lots in question in this suit are parts of a tract of land which was formerly a grain field, at least to a large extent, that the field as a whole appears to the naked eye as a practically level and nearly uniform tract of land. The lots in question had not been recently cultivated, because the period of cultivation embraced in the contract of the Harding Land Company had expired some time before, and the purchasers of the lots had failed to keep up the cultivation and care of the trees. It is very evident that this is due to the fact that the boom in fruit trees had collapsed, as the testimony of different witnesses shows. At the same time there were other lots in the same tract on which were growing young fruit trees which had been planted at about the same time, and which trees had had reasonably good cultivation and other care. These trees were in a flourishing condition and were separated from the trees in question in this case only by a roadway 20 feet wide which had been laid off on the plat. The over-

whelming testimony is that there was no difference between the character of the soil or the lay of the ground on the lots in question and on the lots on which the trees were flourishing. The appearance of these flourishing trees is shown by the large photographs introduced in evidence by the defense. See Defendant's photographs, Exhibits, 37, 38, 39 and 40, Record page 189. The testimony of the witnesses is that in traveling along this platted roadway with the lots in question on the right hand and the cared-for lots on the left hand the impression was that one was simply crossing a practically level field, and that the trees on the right hand had not had proper care or cultivation while the trees on the left hand had had such care. There were no differences in the composition of the soil or in any other substantial respect. (See Record, witness McKay, pages 123-4; witness Kitchin, page 130.) When these young agriculturists were confronted with these facts and asked to square their theory as to the soil in question with the showing made as to the growth of the trees on the other lots, they were without any satisfactory explanation, but it plainly and unmistakably appears from their testimony that they deliberately shut their eyes to the facts. No one has questioned or will question the genuineness or authenticity of these photographs of actual conditions existing, and no witness in the case undertakes to say that there is any difference in the soils as to these particular

lots. A number of witnesses testify that the soil on the lots in question is identical with the soil on the lots in which the trees were shown to be flourishing. This testimony included that of witness Adair, (See Record, page 150), witness Green, (See Record, page 197), and witness McKay (See Record, pages 123-4), all of whom had actually cultivated or tilled the identical land in question. Furthermore experienced growers of fruit trees and men of years of actual practical knowledge like witness Kitchin (See Record page 130), and witness Drew (See Record, page 144,) testified from actual examination of the soils that the soil on the lots in question is identical with that on the lots where the trees were flourishing; that the soil is deep, rich and fertile in character, well adapted to the growing of fruit trees, and that had the purchasers of these lots given them ordinary care and cultivation the trees thereon, with the exception of the peach trees, would have been flourishing the same as the other trees on other parts of the plat. As to the peach trees the Harding Land Company, as well as various witnesses for the defense, admitted and have admitted that the soil proved too rich for their successful growing, the testimony of practical fruit growers showing that peach trees thrive better on a lighter and poorer quality of soil. Witness McKay, an experienced farmer and Deputy County Assessor, who had farmed the particular lands in question, testifies at page 125 of the Record:

"The quality of the soil is above the average in that locality. That farm was always considered a good farm, and it is above the average." In this he is corroborated by the witnesses Drew, Green, St. John, Kitchin, Adair and others.

There is abundance of testimony, practically undisputed that the fruit trees planted by the Harding Land Company on the lands in question grew and flourished during the period within which the Company undertook to care for them, and their subsequent deterioration was due, with the exception of the peach trees, entirely and wholly to the neglect of the lots by the purchasers. (See Record, page 193. Witness Green.) It will be remembered as to the two Hart tracts that Hart caused a contract to be made with one Carvalho for the cultivation of his lots, but the testimony shows that Carvalho did not give them proper care. This, of course, was not the fault of the Harding Land Company. (See testimony of Hinkley, Record pages 136-7.)

With reference to the failure of the peach trees to grow upon this land, the testimony shows that when the lots were sold the agent of the Harding Land Company produced advertising matter of the Company setting forth that peach trees could be planted as "fillers" and would begin to bear in about three years, and thus bring in profit before the apple trees would mature, and of course, the intention was

that afterwards the peach trees would be removed so as to give the whole of the soil to the apple trees. This literature was general in character but there is no doubt that the agent of the Harding Land Company represented and the Company expected that these statements would apply to these particular lots. All the testimony in the case shows, however, that these representations were innocently and honestly made, that a part of the soil in question was really too rich for the successful growing of peach trees. As to why the peach tree will flourish on a lighter and poorer soil we need not stop to discuss. All fruit-men agree upon this. The plaintiffs utterly failed to show any misrepresentation whatever except as to the peach trees, and the Harding Land Company, long before suit was filed or threatened realized and frankly admitted that the soil in question was not adapted to peaches; although some of the peach trees did grow and flourish and the testimony shows that they were bearing fruit at the time of the trial (See Record page 129, Witness Kitchin). As shown elsewhere in this brief, this matter was taken up with Mr. Hart who authorized the Company to replace the peach trees with pear trees which were found to be better adapted to the soil in question, and that under authority from Mr. Hart this replacing of trees was done. (See Record, page 212, Witness Wallace.) The same agreement was also made with Mrs. Peterson. (Record, page 136, Hink-

ley.) Therefore, the only misrepresentation in the case was an innocent one, and was atoned for and the matter cured between the parties long before the suit was filed.

As further bearing upon the quality of the soil the Bill of Complaint shows that plaintiffs undertook to say that the soil in question was in a "swale," that it was wet land on which the water stood and that there was a "joint-clay" on the land, and that the land was practically worthless for fruit-growing purposes. A number of witnesses who have known the land for years, testified that it is not in a swale; but that it was formerly, for the most part, embraced in a grain field; that the water does not stand upon it; that it has been worked even in the rainy season, and that there is no such thing as joint-clay present. See the Record, page 120, et seq, Witness McKay; page 149, Witness Adair; pages 197-8, Witness Green.

All the testimony shows that the land was platted as a bona fide orchard proposition, by a Company which had platted and planted thousands of acres in the same county in the same way. The Record shows the price which the land owners paid for the land, shows that they were most of them practical farmers (Record, page 148,) that they examined the land embraced in the plat carefully before purchasing, (Record, page 148,) that they con-

sidered it a bona fide orchard proposition and that two of the land owners, namely, Adair and Green, purchased small tracts for orchard purposes from the Harding Land Company at the same rate per acre for the land that the plaintiffs agreed to pay. See the testimony, Record page 150.

We ask the careful comparison of the testimony of the alleged agriculturists offered by the plaintiffs, with the testimony of Drew, a disinterested witness, a man who has spent a life-time in the growing of fruit trees and the study of soils, and with the testimony of Kitchin, also disinterested, a man of many years' experience in the same line, and who at the time of testifying, was manager of the Umpqua Valley Fruit Union, an association of practical fruit-growers. We also call especial attention to the testimony of St. John. (See Record, page 155,) a witness interested in a large orchard company which had planted hundreds of acres of successful young orchards upon the same kind of soil, located within a few miles of the lands in question. We also call attention to the testimony of these witnesses, and other witnesses, showing that when the lands in question were contracted to be sold orchard lands were greatly sought after, prices were booming, and people expected to make fortunes out of fruit trees; that afterwards and at the time the suit was commenced the boom had collapsed, orchard

lands had become less desirable, no matter what their quality, and a motive clearly existed for the plaintiffs in this case to allege fraud and seek rescission of contract in order to recover payments made by them.

The planting of orchards on a commercial scale was, when the Harding Land Company began its operations, a new thing in Douglas County, and in that county as well as in other localities on the Pacific Coast which appeared to be adapted to the growing of apples there was a wide-spread belief that this industry was upon the eve of extensive and profitable development and that large returns could be secured from it. Naturally every one who invested upon the strength of this common belief was looking to the future, as of course it was a matter of 6 or 8 years before apple orchards could be brought into bearing, and naturally also, there was in the whole movement undue optimism and enthusiasm. No one in particular should be blamed if the future of this industry was universally painted in colors too glowing and attractive. This is the history of all activities of the human mind. The pendulum swings first to one side and then to the other. Today people are looking forward to great returns from the planting of corn or the raising of cattle, or the acquiring of timber lands or the exploiting of mineral resources; tomorrow the public interest will be cen-

tered in fruit-growing or railroad building or ship-building or the selling of town lots, and so on. Invariably these waves of enthusiasm and feverish activity have in them a fictitious element which at the time is not realized by the public. This was the situation as to the planting of the apple orchards in Douglas County at the time the Harding Land Company planted and sold the lots in question. There is nothing in the record that lends color to the contention of plaintiffs that any one connected with the transaction had any fraudulent purpose or corruptly misrepresented anything. The officers and managers of the Harding Land Company selected rich and desirable farm lands which they and their advisors had every reason to believe would be thoroughly adapted to the growing of fruit trees. There is no testimony in the Record worthy of serious consideration that shows that this land is not well adapted to the growing of apple trees. Nothing in the Record shows that the officers and agents of the Harding Land Company were any more to blame than the plaintiffs. So far as the Plaintiffs Hart are concerned, Mrs. Hart was represented by her husband, a stockholder, director, vice-president, and sales agent of the Appellant Harding Land Company, who had every opportunity to investigate and know all the facts, and who, as the testimony shows, in fact, fully investigated and after full knowledge expressed satisfaction with the lots, promised payments,

entered into contract for cultivation of the lots at his own expense, and fully accepted the property, and in every respect ratified the purchase, including the replacing of the peach trees, which unexpectedly failed, with pear trees. No reason or motive can be shown, for the attempted repudiation of the contract or for the cry of fraud which is now made, save that, as the Record abundantly shows, the public mind became sobered, financial stringency came on, the demand for orchard lands abated and these plaintiffs realized it would be more to their interest to get back the money they had paid, than to carry out their contracts.

We regret to say that the Record shows that the learned Judge who tried this case in the court below appears to have overlooked many salient and undisputed elements of the testimony. We refer to page 219 et seq, of the Record, where it will be noticed that the learned court states that the Harding Land Company proceeded to offer this land for sale outside of the state of Oregon, and to people who were not familiar with the locality, and makes no mention of the fact that the testimony shows that some of the platted lots were sold, for example, to Adair and Green, (See Record, page 150) who had purchased the larger tract and that they paid \$200.00 per acre for their lots, which was the same price charged to plaintiffs in this case for the naked lands

Furthermore the learned court seems to overlook the testimony which shows that the lands in question were of first-class character and that there was not an iota of misrepresentation, except as to the adaptability of the land to the growing of the peach trees, which were intended merely as "fillers" to remain temporarily. The learned court makes no mention of the subsequent examination of the lands and the ratification and affirmance of the contracts by the plaintiff and her assignors, attaches no importance to the connection of Hart with the Land Company itself, and fails to realize that the price of \$350.00 per acre included not only the price of the land which was to be \$200.00 per acre, but covered the cost of planting the lots with fruit trees and caring for and cultivating the same for a term of three years.

Again the learned trial court said at page 222 of the Record:

"The defendant produced a good many witnesses to testify that in their opinion it would produce good orchards, but it was a striking feature in the case that no witness was produced who testified that he knew of any profitable commercial orchard growing in Douglas County on such land. And, under the circumstances of this case, I think, in the first place, that where exploiting companies make representations of this kind to intending purchasers outside the state and persuade them not to examine

the land, they ought to be held to strict accountability, and the judgment of this court is that the plaintiff is entitled to a decree setting these contracts aside, and a judgment against the Land Company for the money they have paid on them, and for the costs of this proceeding." We regret that the court in this part of its statements overlooked the fact that the planting of commercial orchards had just begun in Douglas County, that the witness Adair, one of the land owners stated that one circumstance that satisfied him of the value of the land for growing apple trees was that he knew of apple trees that were growing successfully upon the same kind of soil in the same county. See Record, page 148. See also testimony of St. John, Record p. 155. Furthermore the court unfortunately failed to take notice of the fact that other lots in the same plat, as shown by defendant's photographs, (See Defendant's Exhibits 37, 38, 39 and 40) were successfully growing these trees, because the purchasers had continued to care for them after the Harding Land Company's stewardship ceased.

The writer of this brief was born and reared in Oregon. From his early boyhood days he has heard wise men say that the greatest draw-back to the development of Western Oregon was the fact that so many individuals held large tracts of land which were not properly cultivated nor made to produce

such an income as they were capable of producing. These wise men have always contended that the country would never be prosperous until these large tracts were subdivided and intensely cultivated.

During the past six or seven years a number of different individuals and syndicates have been engaged in buying up these large tracts of land, subdividing them and planting them to orchards and reselling them. In fact, at the time the plaintiff and her assignors purchased the tracts of land involved in this litigation small tracts planted to fruit trees were very much in demand.

The literature used by the defendant corporation in exploiting the land offered for sale by it is of the ordinary kind. It is not unreasonably extravagant. It is common knowledge that not every particular tract, even in the same locality, will produce the same kind of fruit or other vegetation. Sometimes the difference in the production of two different tracts of land in the same vicinity cannot be accounted for. Sometimes it is due to the soil. At other times it is entirely due to atmospheric conditions. That the representations made in the literature sent out by the defendant corporation were not false in general, or made to mislead is abundantly established by the evidence. While the three particular tracts involved in this litigation may have been misrepresented in this, that peaches will not

grow successfully, yet we insist that the preponderance of the evidence clearly establishes that they will grow other fruit. It isn't a question of guessing because other tracts of the same large tract separated from those involved in this litigation only by a twenty foot road, demonstrate that fruit trees thrive and flourish there.

Now in the light of all these circumstances and these conditions, with the opportunity these parties had of examining the land for themselves, how can it be said that the defendant corporation defrauded the plaintiff and her assignors? We believe the evidence establishes very clearly that the representations made about the land were made in the utmost good faith, honestly believing them to be true. The evidence clearly demonstrates that those representations are true, except in the one particular, which was a representation of what might be done and not a statement of actual quality or condition which could have been determined without experiment.

Surely the defendant corporation is not to be found guilty of fraud because it has made an honest mistake in the transaction of an honest business with everything done openly and above board and with the plaintiff and her assignors given every opportunity to investigate.

The evidence clearly shows that as soon as the

defendant corporation became aware that the lands sold to the plaintiff and her assignors was not adapted to the producing of peaches it openly and frankly informed the plaintiff and her assignors of that condition and offered to make the mistake good by interplanting pear trees. The plaintiff and her assignors agreed to this. The plaintiff and her husband went so far as to make contracts with other persons for the cultivation of their several tracts but the contracts were not executed, and the orchards neglected. The consequence is, the trees have deteriorated.

The demand for small tracts planted to fruit has waned. Those who have invested in such tracts without first carefully computing the cost find it quite an expensive experience to properly cultivate a tract of land planted to fruit trees and properly care for the trees until they come to the bearing period, consequently a great many who invested in small tracts of land planted to fruit trees in the Umpqua Valley would like to be released from the burden they have assumed. The plaintiff and her assignors are among such. In order for them to do so they seek to cast the cloud of fraud upon the defendant corporation and its officers.

We believe also that the evidence very clearly shows that the defendant corporation was as much deceived by the failure of the tracts of land in question to produce peaches as were the plaintiff and her

assignors. We believe that the defendant corporation showed anything but an intent to defraud or work an injury when it offered at its own expense to replant the trees that had died with trees that experience had taught would flourish in that particular soil and locality. We believe that the evidence adduced by the plaintiff falls short of establishing fraud. At the most a mere mistake has been shown. The land was purchased by the plaintiff and her assignors for the purpose of growing apples.

### **Facts Showing Ratification and Affirmance.**

Hart testifies he first saw the land in July, 1912, (Record, page 82); that he tried to see it in January, 1911, but it was covered with four inches of snow; in February, 1912, it was covered with water. He testifies that he entered into business with the defendant Harding Land Company as sales agent in 1911, (Record, page 83). He identified the written contract, dated March 2nd, 1911, under which he became an agent to sell fruit lands for that Company, the Company which he now claims defrauded him. He and his partner became practically exclusive sales agents for the Company, selling just such lands planted to young orchards as he and his wife bought from the Company. He identified a letter dated April 12th, 1912, Defendant's Exhibit A, (Record, page 85,) remitting to the Harding Land Co.,

four hundred dollars to apply on the very land in question, and this, according to his own testimony, was after his second visit to the land. What he says about snow and water on the land is not worthy of great weight. This would not prevent his seeing the young trees, the orchards on neighboring lands, the topography of the land, and in fact anything except the mere texture and quality of the soil. But further, the testimony shows that the snowfall was quickly gone and he admits he remained in the vicinity a week without going back after the snow had melted. The testimony of Green, (Record, page 198) and McKay (Record, page 123) shows that water has never stood on this land so as to prevent inspection of it. After his return to South Dakota, he wrote, under date of March 8th, 1912, Defendants Exhibit 3, in which he writes to Harding, the president of the Land Company: "The trip was beneficial to me in more ways than one. I saw the country and when it was looking fine, and I can talk it all the more. Expect a big business here for a few months." He says when he wrote this letter he was vice-president of the defendant Harding Land Company, owned stock and was a member of the board of directors, the Company he now sues for alleged fraudulent sales to himself and wife. The testimony of the plaintiff, Mrs. Hart, is (Record, page 80,) that her husband represented her in all matters connected with the land. As to his activity in the affairs of the Land

Company, we ask attention to his letters in evidence, found at page 85, et seq, of the Transcript of Record. And we ask attention to his letter of June 27th, 1912, (Record, page 88,) in which he stated that he had sold the two tracts owned by him with the W. C. Harding Land Company to Mrs. Glenn D. Hart (his wife) and that she was doing everything in her power to make a payment on the one he owned in Plat D (land in question). It will be noted that this letter was written after he had twice visited the land, and of course while he was thoroughly familiar with all operations of the Harding Land Company, being himself one of the chief officers of that Company.

Defendant's Exhibit 13 is a letter written by Hart under date of August 23rd, 1912, in which he proposes to return to Harding the stock which he owned in the Company and take back his notes. Again in Defendant's Exhibit 15 (Record pp 89 and 90), under date of March 20th, 1913, Hart writes to Harding, among other things: "I am for you all the time. I hope that you will prosper and that your company will be the biggest in the world in a few years." This does not sound like a communication from a man who had been defrauded in the sale to him of a piece of land, with which he had then become thoroughly familiar.

Under date of November 6th, 1912, Hart wrote to

an officer of the Harding Land Company, Defendant's Exhibit 20, (See Record, page 90), in which he says: "I am thinking seriously of caring for my wife's tracts in Flat D this coming year myself. I have a certain knowledge of how to look after an orchard, so will try my hand at it." This letter was written after repeated examinations of the land in question, refers to that very land, and is to the effect that Hart himself knew something about the care of an orchard, as well as how to sell the same.

We ask the careful reading of other letters which are shown in the Record, written by Hart, showing his intimate connection with and interest with the Harding Land Company, which Company he now claims defrauded him in the sale of the land, showing that he had every opportunity to know and did know all about the land, and by his repeated statements showed his satisfaction with the character thereof.

These letters are absolutely inconsistent with any conclusion that Hart was, or could have been deceived or imposed upon in the manner which he claims.

He was strictly on the "inside" and the effort now made to recover what was paid on the land is similar to Hart's action in soliciting Harding to take back the stock which Hart had purchased in

the Harding Land Company. It must be remembered, as Mrs. Hart herself says, Hart represented and acted for her at all times with reference to this land, besides being himself an original purchaser from the Harding Land Company. We ask special attention to his testimony on redirect examination. (Record, pages 91-2), where with reference to the alleged representations made to him at the time of the sale he says: "I first learned about the falsity of these statements after my wife had turned the proposition over to her attorneys and they had made an investigation and reported, in May, 1913; down to then I believed that this land was as represented." Is it not extraordinary that a man engaged in the business of selling orchard lands should be so innocent and gullible that he did not know that he had been defrauded until he consulted an attorney?

We have thus far directed the court's attention solely to the testimony of Hart himself in connection with his own letters introduced in evidence. We now desire to call attention to the testimony of others showing his full knowledge, as well as his opportunities to know all about the land, his satisfaction with the land, and his full ratification of everything until the time came when the boom in orchard lands collapsed, and Hart conceived the idea that by alleging fraud he might bring about the rescission of the contracts and get back the money that he and his wife had invested.

R. W. Hinkley, a witness on behalf of the defendants, (See Record, page 136), testified that he was for a time employed by the Harding Land Company and that during the winter of 1912-13 there was a conversation in the office of the Company between Mr. Harding, Mr. Hart and himself, and says: "As I understood it the Harding Land Company's time for cultivating that land was up with the season of 1912, and Mr. Harding and Mr. Covalho had made some arrangements for the cultivation in 1913, and Mr. Hart asked me to write out a contract between him and Mr. Covalho for the cultivation during 1913, which I did. The cultivation was to be at Mr. Hart's expense, and the contract covered lots 18 and 19 in Plat D. Mr. Hart made no complaint at that time that I heard. He requested Mr. Harding or I to sign the contract with Mr. Covalho for him because he was going to leave at that time, or that night. It was written out and Mr. Covalho signed it, and I think Mr. Harding also signed it for Mr. Hart." The lots sold to the Harts are numbered 18 and 19 in what is called Plat D.

W. C. Harding, the president of the Harding Land Company testifies at page 161 of the Record as follows: "I remember Mr. Hart visiting the tract again in February, 1912. He was at Roseburg and we had a stockholders' meeting of every stockholder of the Harding Land Company, that lasted about a

week, and Mr. Hart was at Roseburg for a week or ten days, and virtually everything of interest with regard to our orchard plantings both personal and from a company standpoint was discussed at that time. \* \* \* \* \* I remember Mr. and Mrs. Hart's visit to Roseburg again in July, 1912, I do not think I visited their orchards with them at that time. I talked with them both while they were at Roseburg. We did not particularly discuss their own orchard tracts only that they both expressed pleasure over the thought of quickly coming to the Umpqua Valley or Oregon to live. I do not think either of them made any complaint to me at all about the condition of their orchard or the land on which it was planted at that time \* \* \* \* \* I heard the testimony of Mr. and Mrs. Hart to the effect that I promised at that time to sell the tracts near Wilbur and give them some land near Garden Valley. The fact is I didn't make any such promise. Mr. Hart was our sales agent at that time. Our Roseburg office made very little effort in attempting to sell land. I personally made practically none. Furthermore I couldn't have promised anything at Garden Valley because everything at Garden Valley had been sold for nearly three years, with the exception of the hills and some few tag ends that weren't worth while." Again at page 164 of the Record, Harding testifies: "Mr. Hart after his election to the legislature came to Oregon some time the

latter part of December, 1912; at that time I called his attention to the fact that our stewardship had virtually ceased, and it would be up to him to care for his tract the next year. We had a former discussion about this matter back in Dakota when I was there in September, 1912, and Mr. Hart authorized Mr. Hinkley and myself as his agents, to go into contract with Mr. Cavalho. \* \* \* We entered into this contract with Mr. Cavalho for Mr. Hart and he had charge of the orchard from that time on. This arrangement was not made because we were short of funds, it was because our time for caring for his orchard had expired." Again at page 166 of the Record, Harding testified: "The main conversation I had with Mr. Hart as to his getting further time on his payments was back at Deadwood, South Dakota, in September, 1912, at the time I was there for a week or ten days. Mr. Hart was very much worried because Mr. Eddy insisted on payment, Mr. Eddy being trustee as between the land owners and the lot owners, that is the original land owners, the Harding Land Company and the purchasers. \* \* \* Mr. Hart said that until they sold their news stand they didn't have the money to pay Mr. Eddy, and suggested that I get Mr. Eddy to give him a deed and mortgage to these tracts, in other words to deed the land to the Harts and take a mortgage back." (Record, page 167.) "I don't remember that Mr. Hart ever made any complaint to me about his orchard

or the condition in which he found it during all of these conversations I had with him. I first knew Mr. and Mrs. Hart were dissatisfied when suit was threatened in 1913, the summer or spring. Mr. Hart was then represented by the same attorney who now represents him."

As still further bearing upon the fact that after full knowledge of the land purchased by Mr. and Mrs. Hart, gained by repeated visits to the same, and while Hart was engaged in the identical business of selling orchard lands, we would call attention to the testimony of J. D. Zurcher, a disinterested witness, see Record, page 187. Witness was secretary of the Roseburg Commercial Club, and he testified at page 191 of the Record: "I am well acquainted with Mr. Hart and I met Mrs. Hart at the time she visited Roseburg in 1912. \* \* \* I talked with both Mr. and Mrs. Hart in the office of the Harding Land Company, and I asked them when there how they liked Douglas County, or especially Mrs. Hart, because it was her first visit, and how they liked their investment and she told me they were well satisfied. She said they had been out looking at their tract and they were well pleased with it. She said the tract was over at Wilbur. \* \* \* I had several occasions to talk with Mr. Hart about his investment there in Plat D, and each time he told me it was fine, and he was coming there to live."

L. B. Wallace, who was at one time secretary of the Harding Land Company, testifies at page 211-2 of the Record with reference to the growth of the trees on the lands sold to the Harts, and says the apple trees were healthy, but the peach trees did not do well in the first year. "We thought that the peach trees would grow after they had a year's growth on these two lots, 18 and 19, and in the spring of 1911 we replaced a few peach trees that had died with new peach trees and we did not satisfy ourselves until 1912 that peach trees would not make a satisfactory growth in this land, so we first took the matter up with Mr. Hart in February, 1912, I think. This was in the office of the Harding Land Company at Roseburg. Mr. Hart was acting as one of the sales managers of the Harding Land Company, and was after he had become a stockholder. Mr. Hart said to go ahead and replace the dead peach trees with pear trees. The peach trees that had not died were not replaced. This arrangement referred to both lots 18 and 19. After that we planted trees, replanting the dead peach trees with pear trees in the spring of 1912." \* \* \* \* (Record, page 212.) "I remember Mr. and Mrs. Hart visiting Roseburg in July, 1912, and going out to Plat D, but don't know who took them out." (Record, page 213.) \* \* \* "I had a talk with them in July, 1912, with reference to their Plat D land and they seemed to be perfectly satisfied, with this ex-

ception, Mrs. Hart seemed to be disappointed that the peach trees had not proven to be satisfactory on these tracts, but when I mentioned to her the fact that Mr. Hart had instructed us to plant pear trees she seemed to think the Company had done all that they could do and apparently was satisfied. Neither one of them told me that they were dissatisfied with these lands to my knowledge. No one who has ever purchased any land in Plat D through our Company ever indicated to my company or myself in any way any dissatisfaction with the soil in Plat D. The chief failure or difficulty in Plat D was the peach trees, the pears and apples on 18 and 19 were good."

We have made the foregoing notes from the testimony and from Mr. Hart's letters as showing full ratification and acquiescence in the sales contracts long after he and Mrs. Hart had full knowledge of the land and of the conditions. The Company's representations as to peaches had partially failed on these tracts, but the Record shows that this was not due to any fraudulent misrepresentations, but to an honest mistake, which was rectified with the express knowledge and consent of the Harts by replacing the peach trees with pear trees. Long after this was done Hart took over the lots, assumed the future care and cultivation of the same, and authorized the making of the cultivation contract with Carvalho on his behalf.

In taking up the consideration of the matter of ratification and affirmance by Mrs. Peterson we must ask the court to especially observe that part of her testimony found on page 97 of the Record, reading as follows: "I purchased my land in April, 1910. It was planted the next fall. I saw rocks all over the tract, I thought they were pretty thick for a first class orchard tract to be properly taken care of, and some of them were a pretty good size---as big as my head and larger---I couldn't say whether they were smooth rocks, waterwashed rocks or whether they were igneous rocks, found in the hills." Even a hasty examination of the testimony in the case will show that these statements of Mrs. Peterson about the rocks on the land were false. Every witness in the case on either side, who was asked about the rocks, said that he had seen nothing of the kind. Men who had cultivated the land repeatedly and had been over it time and again testified that nothing of the kind existed on the tract. (See Record, pages 105, 127 and 202.) This testimony should be remembered, in considering the other testimony of Mrs. Peterson, in which she undertakes to tell of the condition in which she found her tract, of the statements which she says the officers of the Harding Land Company made to her, and her denial of the agreement claimed by the Company as to replacing dead peach trees with pear trees.

The witness, Hinkley, testifies at page 134, of the Record: "Mr. and Mrs. Peterson both visited the land and I took them out in an auto. At that time the tract looked to me as though it had just been disked, gone over with a disk, presumably, and the dirt had been thrown towards the trees a little, and had a little rough appearance, very few weeds on it at that time, and the cultivation was such as in the orchards generally at that time of the year. In the cultivation of orchards, after using the disk I have always gone over it with a harrow, the fact that there were some clods would not necessarily indicate a lack of care at that time." Again at page 136 Hinkley says: "After we had examined this lot I heard part of the conversation, at least, had between Mr. and Mrs. Peterson and Mr. Harding. It was held in the office of the Harding Land Company, I think the following day. The substance of it was that we agreed to plant pear trees in place of the peach trees on the tract the following winter, and we gave her a written statement. I believe they left the office, and we were to write out this statement and Mr. Peterson came back and I gave it to him. Mrs. Peterson was there and heard and understood what was said about settlement. I wrote out the memorandum; I won't say whether Mr. Harding dictated it to me or whether I wrote it out myself, but I wrote it on the typewriter myself." \* \*

\* \* "I understand that Mrs. Peterson accepted it

as satisfactory as nothing was said otherwise." The memorandum of agreement referred to in this testimony appears at page 98 of the record, and shows that the Harding Land Company was to remove the peach trees on the land, which had been planted as "fillers" in the rows between the apple trees, and plant in lieu thereof pear trees, part Bartlettts and part de Anjous, etc.

Mr. Harding, president of the Harding Land Company, testifies at page 162 of the Record: "I heard the testimony of Mrs. Peterson about her visit to her tract No. 17. She was not pleased with her orchard and said she looked for larger trees. I remember one statement she made that it didn't look as large as an orchard that her father at one time planted back east, but I suggested that possibly orchard methods might have changed in the last few years, and the question of pruning, and things of that kind, might have changed decidedly since that orchard back east was planted. We agreed with Mrs. Peterson to plant pear trees in place of the peach trees; in fact, give her a full planted pear orchard, as well as apple orchard, with the suggestion that in the course of a number of years, she could then make a choice between pears and apples. She and Mr. Peterson both assented to this. We gave her a letter which Mr. Hinkley who was then secretary of the Harding Land Company, and my-

self as president, both believed would act as a supplemental contract.”

## Points of Law.

### I.

The right to rescind a contract upon the ground of fraud may be lost by delay, as it is the duty of the person claiming to have been defrauded to act promptly upon discovery of the fraud. He cannot sit on the fence and wait for developments to indicate whether his interest will call for affirmance or rescission. If he is to rescind he must do so promptly. Acts of ownership after knowledge of the alleged fraud will preclude rescission.

Scott v. Walton 32 Or. 460, 52 Pac. 180, 181;

Dundee Mortgage and Trust Company vs. Goodman, 36 Or. 453, 60 Pac. 3;

Vaughn v. Smith, 34 Or. 54, 55 Pac. 99;

Elgin v. Snyder, 60 Or. 297, 118 Pac. 280;

Whitney v. Bissell, . . . Or. . . ., 146 Pac. 141;  
L. R. A. 1915 D. 257;

Shappirio v. Goldberg, 192 U. S. 232, 48 L. ed 419;

Grymes v. Sanders, 93 U. S. 62, 23 L. ed. 798.

Simon v. Goodyear Metallic Rubber Shoe Co.,  
44 C. C. A. 612, 105 Fed. 573, 52 L. R. A. 745.

## II.

Under all the authorities, after a party claiming to have been defrauded has acquired knowledge of the facts, if he affirms the contract there can be no rescission.

Faulkner v. Wassmer, (N. J.) 77 Atl. 341, 30 L.

R. A. (N. S.) 872, and note in L. R. A.

14 Am. and Eng. Enc. Law (2nd ed.) 159, 161.

## III.

Representations as to prospective profits from the peach trees cannot be relied upon as statements of fact, but amount only to expressions of opinion.

39 Cyc. 1274;

Gordon v. Parmelee, 2 Allen 212.

## IV.

Assignment by the purchasers of two of the three contracts in question affirmed the contracts and prevents rescission, especially as the assignments were made after full knowledge of the facts.

Cooper v. Hillsboro Garden Tracts, (Oregon,) not yet officially reported, 152 Pac. 488.

The Oregon case of Whitney v. Bissell, ..... Or. .... 146 Pac. 141, (decided in February, 1915,) was a suit brought to foreclose a mortgage on orchard land. The defense was that there was mis-

representation as to the value of the products of the premises for a given year. The court held against the defendant on the ground that there had been ample opportunity to learn the truth and he had by his delay lost the right to rescind the contract. In the report of the case found in 146 Pac. at page 144 the court says: "As held in *Scott v. Walton*, 32 Or. 460, 52 Pac. 180, a party induced by fraud to make a contract has, upon the discovery of the fraud, an election of remedies, either to affirm the contract and sue for damages, or disaffirm it and be reinstated in the position in which he was before it was consummated. \* \* \* \* If he desires to rescind he must act promptly. \* \* \* \* He cannot retain the fruits of the contract awaiting further developments to determine whether it will be more profitable for him to affirm or disaffirm it. Any delay on his part, especially in remaining in possession of the property received by him under the contract and dealing with it as his own, will be evidence of his intention to abide by the contract. See, also, *Vaughn v. Smith*, 34 Or. 54, 55 Pac. 99; *Sievers v. Brown*, 36 Or. 218, 56 Pac. 170; *Elgin v. Snyder*, 60 Or. 297, 302, 118 Pac. 280."

On the same page the court proceeds further: "The rule as to the knowledge of the fraud before there would be an acquiescence therein is subject to the principle that notice of acts and circumstances

which would put a man of ordinary prudence and intelligence upon inquiry is equivalent in the eyes of the law to knowledge of all the facts a reasonably diligent inquiry would disclose. 6 Cyc. 305; Clark on Contracts, page 236." \* \* \* \* "Under the circumstances of this case, it does not appear that defendant Bissell indicated a desire to rescind the contract within a reasonable time after he could have discovered the alleged fraud by the use of due diligence, which amounts to the same things as a discovery. He failed to act promptly in the matter, retained the possession of the land, cultivated the same for a long time, set out fruit trees, speculated upon a rise in the market both as to crops and real estate, and asked and obtained an extension of time for the payment of a portion of the interest, a part of which he paid on his notes, without making any complaint after he knew or should have known the condition of affairs. We think he should be deemed to have affirmed the contract and waived his right to rescind. See *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799; *Kingman v. Stoddard*, 85 Fed. 740, 29 C. C. A. 413; *Van Gilder v. Bullen*, 159 N. C. 291, 74 S. E. 1059; *Simon v. Good year Metallic Rubber Shoe Co.*, 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745."

Some of the leading Oregon cases upon the question are cited in the opinion from which the above quotations are taken. The rule in Oregon

clearly is that not only must the vendee act with promptness after the actual discovery of the fraud, but that he must act promptly after he has notice of facts and circumstances which would put a man of ordinary prudence and intelligence upon inquiry. So it was held by the Supreme Court of California in the case of *Lee v. McClelland* 120 Cal. 147, 52 Pac. 300, that means and opportunity of acquiring knowledge of fraudulent representations inducing the sale of land are equivalent to knowledge. See also *Evans v. Duke*, 140 Cal. 22, 73 Pac. 732;

In connection with the New Jersey case of *Faulkner v. Wassmer* 77 Atl. 341, 30 L. R. A. (N. S.) 872, there is an extensive note bearing upon the waiver of a purchaser's right to rescind a contract for purchase of real property, and the ground of delay is fully treated with a large citation of authorities. In the case of *Grymes v. Sanders*, 93 U. S. 62, 23 L. ed. 798, at page 802, of 23 L. ed. Mr. Justice Swayne says: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once indicate his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection and will be conclusively bound by the contract, as if the mistake or fraud had not occurred.

He is not permitted to play fast and loose." Our position is that the record in this case shows precisely this disposition on the part of the purchasers of the lots in question to play fast and loose. Hart, the husband of plaintiff, who purchased one of the lots in question for himself and one for his wife, as a stockholder, director, vice-president and sales agent of the Harding Land Company, had every opportunity to have full knowledge of the whole situation as to fruit lands and as to the location, quality and condition of the lots in question. He not only had the opportunity to have knowledge but he had actual knowledge by personal inspection repeatedly made during a period running from one to two years before suit was filed, and before any complaint was made to the Harding Land Company or any demand for rescission made. As to the lot purchased by Mrs. Peterson, the Record shows that the Harts were her old friends and her advisers, and while she herself did not have the same opportunity to know the truth and did not inspect the land so soon, yet the Record shows that full settlement was made with her as to the matter of peach trees, and she had no other ground of complaint whatever. She denies that she made the subsequent contract with reference to the replacing of the peach trees with pear trees, but the weight of the testimony is

against her. Against her is the writing given her by the Harding Land Company, which was produced in court upon the demand of this Appellant, and also the testimony of the witness Hinkley, who was at the time of testifying absolutely disinterested. When she made the arrangement as as to the substitution of pear trees for peach trees she affirmed the contract as thus modified. A contract cannot be rescinded or disaffirmed after it has once been affirmed expressly or impliedly with the full knowledge of the alleged fraud. The party may have a right to rescind, but is not bound to do so, and when he has once made his election he is bound by it. See *Faulkner v. Wassmer*, (N. J.) 30 L. R. A. (N. S.) and note, 872; 14 Am. and Eng. Ency. of Law (2nd ed.) 159, 161. See also the case of *Provident Loan and Trust Company v. McIntosh*, 68 Kan. 452 reported in 1 Am. and Eng. Ann. Cases, page 906, where there is an extensive note citing cases from English, Federal and State courts in support of the proposition that delay in rescinding a contract is to be construed as an affirmation of the contract.

The Record also shows in addition to the affirmation of all the contracts in question by the making of supplemental contracts for the planting of pear trees, that Hart on behalf of himself and wife, and long after he had seen the property, asked

for time to make payments, which also amounts to an affirmation of the contracts. See Transcript of Record page 88.

### **As To Peach Trees.**

What has been said as to the effect of delay, of asking time on payments, of the making of the supplemental contracts as to the peach trees, of taking over the cultivation of two of the lots, is not intended to be taken as a waiver of our position that the record shows conclusively that there was no fraudulent representation whatever, and that the land in fact was all that it was represented to be, except merely an innocent misrepresentation that it was good for peach trees. As to this representation, it is not claimed that the selling agent of the Harding Land Company represented anything more than that the land **would** produce peaches profitably and that there was an estimate as to the <sup>quantity</sup> of peaches which it would produce at the end of a given period in the future. There was no representation that the land ever **had** produced peaches or as to what any crops had been. In 39 Cyc. page 1274, the rule on this subject is stated as follows: "A false statement by the vendor as to profits or income actually received by him from the realty contracted for concerns a material fact, is not a matter

of opinion and may amount to such fraud or misrepresentation as avoids the contract of sale. But a statement by the vendor as to his opinion of the profits which can be derived from the realty contracted for, as distinguished from a statement of fact of the profits actually made therefrom, does not amount to fraud or misrepresentation."

"Affirmations concerning the value of land or its adaptability to a particular mode of culture or the capacity of the land to produce crops or support cattle are only expressions of opinion founded on judgment about which honest men might differ materially. Although they might turn out to be erroneous or false they furnish no ground of presuming any fraudulent intent." *Gordon v. Parmelee*, 2 Allen, 212.

Fraud is defined as a false representation of fact made with knowledge of its falsity, or recklessly without belief in its truth. There was no such misrepresentation even as to the peach trees, the testimony showing that the Harding Land Company had every reason to believe that the soil in question was as well adapted to peaches as other soils of the county, which had produced peaches successfully. In fact the testimony shows that the soil in question was probably not well adapted to peaches be-

cause of its being too rich, not because of poor quality. The misrepresentation as to the peaches was not only cured by the supplementary contracts, but it was innocent in the beginning.

### **Affirmation by Assignment of Contracts.**

While we believe it clearly appears from the Record that there was no fraudulent representation as to the sale of any of the three lots in question; that the land is in fact deep, fertile soil, well adapted to orchard purposes; that each of the purchasers has after full knowledge of the land ratified the contracts with modifications as to peach trees, and accepted their respective tracts, and thus have fully affirmed the contracts and are not in any position to claim the equitable relief which they now seek, namely, rescission of contract, at the same time there is a further and conclusive reason why there can be no recovery in this case on the part of the plaintiff for the lot sold to Glenn D. Hart or the lot sold to Ella Peterson. It will be remembered that there were three lots, namely, 17, 18 and 19. Lot 18 was contracted to the plaintiff, Mrs. Glenn D. Hart, while lot 17 was contracted to Ella Peterson, assignor of plaintiff, and lot 19 was contracted to Glenn D. Hart, husband and assignor of plaintiff. The evidence shows that just prior to the commence-

ment of the suit, which was commenced March 9th, 1914, Ella Peterson "for a valuable consideration" assigned to plaintiff all her right, title and interest, claim or right of action in and to said contract; and on April 23rd, 1912, said Glenn D. Hart "for a valuable consideration" assigned to plaintiff all his right, title and interest, claim or demand in and to said contract. These assignments amounted either to affirmations of the contracts or attempts to assign and transfer mere litigious rights. In either case the plaintiff should not be permitted to maintain this suit for rescission as to these lots. In this respect the case is on all fours with the case of *Cooper v. Hillsboro Garden Tracts*, decided by the Supreme Court of the state of Oregon on November 9th, 1915, reported in 152 Pac. 488. In that case one Cooper brought suit for cancellation of ten land contracts signed by the defendant, one only of which was made with the plaintiff, while as to the nine others, he was claiming merely as assignee. The suit was brought for the purpose of rescinding all of the written agreements and recovering the installments paid and the value of certain improvements made by the contracting purchasers. It was alleged that there were fraudulent misrepresentations in making the different sales. The defendant challenged the right of Cooper to maintain a suit for the rescinding of the land agreements which

were assigned to him. The plaintiff prevailed in the lower court but the Supreme Court of the State of Oregon reversed the decision and dismissed the Complaint upon the ground that a mere litigious right cannot be assigned, and upon the further ground that if plaintiff took the position that he did not acquire by the assignments a mere litigious right, but acquired the rights of his assignors in the lands, then the assignments were merely affirmations of the contracts, and the contracts being thus affirmed, neither the original purchasers nor their assignee could maintain a suit for the rescission of the contracts.

In the opinion at page 492 of 152 Pacific Reporter, the court says: "It must be borne in mind, however, that this is a proceeding brought for the purpose of rescinding the transaction in its entirety and placing the parties, as near as the circumstances will permit, in the same positions they occupied before signing the agreement; and the plaintiff must of necessity, accept one of two alternatives: Either, that the assignors parted with all their rights by making an absolute transfer of their entire interests in the contracts and in the lands; or else that the sole purpose of the assignment of the contracts was to enable Cooper to sue. When the assignments were made, not only Cooper, but the

assignors, knew all that was known to them at the time of the trial; the contracts were transferred with full knowledge of the alleged fraud; and therefore the assignments of all the rights arising out of the contracts were **themselves acts which affirmed rather than disaffirmed the agreements.** *Scott v. Walton*, *supra*. If by affirming the contract the assignor waived his right to object, then Cooper cannot complain of any fraud practiced upon the assignor, because the plaintiff cannot have any greater right than was possessed by his assignor. Cooper cannot repudiate these land contracts if, with a knowledge of all the facts, the assignors affirmed them. If the plaintiff hangs his case upon the other horn of the dilemma---and he does, because he says in his brief that the assignors of plaintiff assigned their interest in the lands for the purpose of bringing action and for the purpose of rescission---then he is confronted with the rule that a mere naked right to sue for a fraud cannot be transferred alone and by itself. *Ryan v. Miller*, 236 Mo. 496, 139 S. W. 128, *Ann. Cas.* 1912D, 540; *Gruber v. Baker*, *supra*. The plaintiff has, by his own conduct, waived any right to rescind his individual contract; and he cannot maintain this suit as assignee of the other contracts."

The plaintiff in this suit is in exactly the posi-

tion of the plaintiff in the Oregon case above mentioned. We have already pointed out that as to the lot purchased by the plaintiff, she was at all times represented by her husband in the making of the purchase, and in the subsequent examination of the land, and in all transactions connected therewith, and after he had repeatedly seen the land he accepted it, agreed to substitution of pear trees for peach trees, undertook to look after its future cultivation and care, and in fact authorized a contract with a third party to care for the land at his expense. He had, as already shown, requested time for making payments. Thus as to plaintiff's particular tract the contract was beyond question affirmed, and as to the other two tracts, there was affirmation of the same kind, and, besides the contracts were either affirmed by the assignments, or plaintiff is in court with mere litigious rights which cannot be assigned.

Further, the amount involved in the cause of suit based on plaintiff's own claim is less than two thousand dollars (See Record, page 226,) and therefore upon eliminating the two assigned claims, it follows that the District Court was even without jurisdiction.

The decree of the lower court should be reversed

and the suit dismissed, and this Appellant should be awarded costs and disbursements.

Respectfully submitted,

O. P. COSHOW,  
Attorney for Appellant W. C. Harding Land  
Company.

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## CERTIFICATE.

\*\*\*\*\*

I, \_\_\_\_\_  
 Attorney for Appellant hereby certify that  
 the foregoing is a true and correct copy of the  
 Appellant's Brief and of the whole thereof  
 in the within entitled cause.

\_\_\_\_\_  
 Attorney for Appellant.

=====

## ACKNOWLEDGMENT OF SERVICE.

\*\*\*\*\*

STATE OF OREGON,                                 }  
 COUNTY OF ..... } ss.

I hereby acknowledge service of  
 Appellant's Brief in the within entitled  
 cause, on me in ..... County  
 Oregon, this ..... day of .....  
 1916, by receipt personally of a duly certified  
 copy thereof.

\_\_\_\_\_  
 Attorney for Appellee.



IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MRS. GLENN D. HART and  
GLENN D. HART.

*Appellants,*

VS.

WALTER ADAIR, J. T. EPPERLY, JAMES P.  
BURNS, F. S. GREEN and L. B. WAL-  
LACE,

*Appellees.*

and

W. C. HARDING LAND COMPANY, a cor-  
poration,

*Appellant.*

VS.

MRS. GLENN D. HART and  
GLENN D. HART.

*Appellees.*

---

Brief of Appellees Hart

---

On Appeal from the District Court of the United  
States for the District of Oregon.

E. A. LUNDBURG,  
Solicitor for Appellees Hart.



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Brief of Appellees Hart

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STATEMENT OF THE CASE.

The appellant W. C. Harding Land Company has in its brief made a general statement of the matters in controversy in this suit, however before entering

upon a discussion of appellant's assignments of error and of other matters which appellant seeks in its brief to inject into the record, we desire to amplify appellant's statement of the case in some particulars.

Mrs. Hart seeks the rescission of each of the contracts in controversy upon the ground that appellant made false representations of material facts in regard to the subject matter of the contracts which were relied upon by the appellee and her assignors, and induced them to enter into the contracts, and misled them to their injury, which rendered the contracts voidable and entitled the appellee to a rescission thereof by a court of equity and to a return of the moneys advanced upon the purchase price under the respective contracts.

Mrs. Hart in her bill of complaint (Record, pp. 3-13), after stating jurisdictional facts, alleges in substance in her first cause of suit wherein she seeks rescission of the contract made by the appellant with her, that the appellant's sales agent, T. W. Kendall, prior to the time the contract of sale was entered into, had represented and stated to her, in respect to the land agreed to be sold, comprising 10 acres, and designated as Lot 18, Plat "D," as follows:

(a) That Lot 18 was worth the sum of \$3500.00.

(b) That appellant had caused the soil of said Lot 18 with the rest of Plat "D" to be examined by an expert orchardist, and caused the character and

quality of the soil to be examined and reported upon by such expert, and that such examination and report showed soil particularly adapted to the growing of apples and peaches, and that this tract had the best soil of that section of the Umpqua Valley for such purpose and as good as the "volcanic ash" soil of the Wenatchee District of Washington.

(c) That the soil of said tract was a deep rich loam and easily cultivated.

(d) That the tract was a sort of an upland and had perfect drainage and would not need irrigation.

(e) That said agent exhibited certain panoramic views and blue prints of the Umpqua Valley and gave this purchaser various illustrated and printed booklets, plats and maps, descriptive thereof and published by the W. C. Harding Land Company representing that the statements set out and contained therein were true and applied with equal force to said tract of Plat "D."

(f) That said Plat "D" was the choicest apple land of all the various plats and subdivisions theretofore handled and sold by his company, in that section of Oregon.

(g) That appellant company was thoroughly reliable and trustworthy and would not place on the market or offer for sale any parcel of land not suitable for the purposes represented.

(h) That it was not necessary to make a trip to Oregon to look over and examine said lot of Plat "D," but that it was entirely safe to buy it relying solely upon the statements of his company, and those made by him as agent, without seeing said tract.

(i) That this purchaser could rely upon said agent's representations so made regarding said lot and to take his word for the quality and character of the soil and its adaptability for orchard purposes as the same were true.

The bill then alleges that the statements and representations above set forth which were relied upon and induced appellee to enter into the contract were false in the following particulars:

(a) That said Lot 18 is not worth to exceed \$50.00 per acre and its use and value exists only for ordinary farm purposes when drained by tiling.

(b) That it lies very low, is bottom land and in a swale.

(c) That during high water in the rainy season, the nearby creek overflows and sweeps over parts of the lot.

(d) That water stands on it during the winter months and does not drain away.

(e) That the surface soil is of a stiff, black, sticky nature, while the sub-soil is a sort of joint clay, very tough and the nature of "hard pan" through which water does not soak or drain.

(f) That the said soil is not adapted for orchard purposes and is entirely unfit for the growing or production of apples or peaches.

(g) That during the summer or dry season, said soil dries out, bakes and becomes very hard and cracks, and when plowed it turns up in great clods and chunks and is almost impossible of cultivation.

(h) That its particular qualities, character and location make it utterly worthless for orchard purposes, and to the growing and culture of apple or peach trees and to maintain the same.

The bill then alleges that appellants made further false and fraudulent statements, with knowledge that the same were false and fraudulent, inducing the appellee to act on the same to her damage and to enter into said contract and make payments thereunder in this:

(a) That appellant would plant said tract to Spitzenberg and Newton Pippin apple trees with peach tree fills not less than 46 to the acre, and give thorough cultivation and care to the same in every detail necessary to the proper growing of said trees for the period of 3 years, and that they would replace any trees that should from any cause die or become injured, and that they would deliver to this appellee a full set thoroughly cultivated planting as aforesaid.

For a second cause of suit Mrs. Hart in her bill seeks the rescission for like reasons of a like contract between appellant and Glenn D. Hart, her husband, with respect to Lot 19, of said Plat "D," and alleges the payments thereunder made, and alleges that on April 23, 1912, Glenn D. Hart for value assigned to appellee all his right, title and interest, claim or demand in and to said contract, which assignment was duly approved by appellant and by B. L. Eddy, Trustee.

For a third cause of suit Mrs. Hart in her bill seeks the rescission for like reasons of a like contract between the appellant and Ella Peterson, with respect to the sale of Lot 17, of said Plat "D," and alleges the payments made thereunder, and alleges that prior to the institution of this suit Ella Peterson for value assigned to appellee all her right, title and interest, claim or right of action in and to said contract.

The bill then prays the rescission of each of the contracts and for the return of the payments made on the purchase price under said contracts with interest, and judgment therefor against all the defendants.

The foregoing is deemed a sufficient reference to the allegations of the bill in view of the appellant's alleged errors of the trial court and its brief thereon.

Issue was joined on the allegations in each cause of suit of the bill of complaint by the appellant W.

C. Harding Land Company, denying the same in the language of the complaint, and by alleging that the soil of the several tracts was of a deep, fertile nature, well adapted to the purposes for which it was sold, but admitting that it was unknown to appellant that at the time it was sold said land was not particularly adapted to the growing of peaches, and further alleging that appellant had fully performed each of the contracts as to the planting and cultivation features.

The appellant further answered each cause of suit, by alleging that the peach trees were planted for temporary purposes only by the parties to the contracts, and as soon as appellant ascertained that the peach trees did not flourish as it believed it would it did everything in its power to fully perform and comply with the exact terms of its contracts and did offer thereafter to substitute pear trees as such fillers for the peach trees for the reason that it was known that said soil and climate was especially adapted to the growing of pears, and,

That appellant alleges further that up to the time of the expiration of its contract for the care and cultivation of the tracts the same were in good first class condition in all respects as represented by appellant, except that the peach trees remaining thereon were not as vigorous and healthy as it was hoped they would be and that thereafter the land and orchards were not in as good condition as they

would have been had they received proper care and attention.

(Appellant's Answer, pp. 32-40.)

It was upon the issues as outlined above that the appellant submitted its case in the court below and the case was tried on the merits.

The appellant did not interpose any defense to appellees' bill claiming a ratification of the contracts or any of them in the court below; it is true however that the answer of Adair, Epperly, Burns, Green and Wallace, the land owners, to appellees' bill in the court below interposed a defense, alleging that after each of the purchasers mentioned in the bill of complaint learned and fully knew of the exact location, quality and character of the soil of said respective lots of land and the quality and kinds of trees planted thereon by the Harding Land Company, and of the nature and care and cultivation given to said lots by the Harding Land Company, and of the fact that peach trees had not grown successfully as expected; that each of the purchasers agreed that if the Harding Land Company would take off the peach trees and replace pear trees, that each of them would accept the lots, \* \* \* and in all other respects said purchasers were satisfied with said lots and the orchards thereon, and accepted same according to their respective contracts, and that Glenn D. Hart became a stockholder in the Harding Land Company, and a sales agent for it, and as such stockholder and sales agent actually in-

spected each of the tracts, and that Mr. and Mrs. Hart, prior to July, 1913, while in full possession of all the facts involved, approved and ratified their contracts, and the defendant land owners allege that for the reasons stated neither of the respective purchasers nor the appellees, Hart, herein ought now to be admitted to allege that they or any of them have been damaged by the alleged failure of said peach trees to grow or by any alleged defects in fruit trees, or by reason of the said soil being, as alleged, unfit for the growing of fruit trees or being in any way deficient or contrary to the representations of the Harding Land Company at the time of said respective sales or at any time. (Record, pp. 30-32.)

Upon a trial of the issues in the lower court as above outlined, before Hon. R. S. Bean, Judge, a decree was entered granting a rescission of all three contracts and awarding a judgment in favor of the appellees, Hart, for the return of the moneys paid on the purchase price under the three contracts against the appellant, Harding Land Company. (Record, pp. 226-231.)

Appellant makes the further claim on its behalf that the plaintiff can maintain no suit upon the contracts made with her assignors, because the assignments either affirm the contracts, so as to preclude rescission, or the plaintiff is claiming assignments of mere litigious rights which cannot be assigned. A sufficient answer to this contention is that appellant interposed no such defense in the court below

and seeks by a mere statement in its brief to inject it into the record as an issue on appeal, although no such defense was ever thought of, pleaded or considered upon the trial in the lower court.

### ASSIGNMENTS OF ERROR.

It is not required of these appellees to set forth the assignments of error since they appear in the brief of the appellant. But the appellees desire to call the attention of the court to these assignments of error in the following particulars:

Of the nine assignments of error set out in appellant's brief and upon which appellant predicates his case for review in this court, seeking a reversal of the decree of the lower court, not one state any particular error, nor indicate to court or counsel in what respect the court erred. In fact, these assignments specify in effect nothing more than that the court erred in deciding the case at all, and that the decree is erroneous in being for the wrong party. There is nothing in any of the assignments of error specifying in any particular whatever wherein the court erred, and by the mere reading of such assignments of error it will be clear that they contain no assertion which would indicate to the appellate court what questions it is called upon to decide, and it will be equally evident none of the assignments of error even suggest any of the questions of fact or law argued in appellant's brief. All of appellant's assignments of error are so general in their terms as to fail to raise any questions for the consideration of this court.

## POINTS OF LAW AND AUTHORITIES.

## I.

None of the so-called assignments of error set out separately and particularly any error made by the trial court, as is required by Rule 11, of this court, and are therefore not entitled to consideration.

Rule 11, United States Circuit Court of Appeals for the Ninth Circuit.

*Richardson v. Walton*, 61 Fed. 535.

*Metropolitan Nat. Bank v. Rogers*, 53 Fed. 776, at 780.

## II.

An assignment of error which merely recites that the court erred in decreeing a certain thing, as for instance, "the rescission of a contract," is too general in that it does not state any particular error and only amounts to stating that the court erred in so deciding, and will not be noticed in the appellate court.

*Florida Cent. & P. R. Co. v. Cutting*, 68 Fed. 586.

*Doe v. Waterloo Min. Co.*, 70 Fed. 455.

*Hart v. Bowen*, 86 Fed. 877.

*Oswego Twp. v. Trav. Ins. Co.*, 70 Fed. 225.

*Supreme Lodge K. of P. v. Wethers*, 89 Fed. 160.

*Sov. Camp W. O. W. v. Jackson*, 97 Fed. 382.

## III.

An assignment of error which is too general in its terms to be noticed, cannot be aided by an attempt to make the same more particular in the brief.

*Doe v. Waterloo Min. Co.*, 70 Fed. 455.

*Sov. Camp W. O. W. v. Jackson*, 97 Fed. 382.

## IV.

Nothing can be assigned as error which contradicts the record, nor can the appellant be allowed to assign for error the ruling of the court in respect to any defense not set up in his plea or answer. Appellate courts cannot amend the pleadings, nor can they allow this to be accomplished by an assignment of error.

*Bates v. Coe*, 98 U. S. 32-47.

*Johnsonburg Brick Co. v. Yates*, 177 Fed. 389.

*Mesa Market Co. v. Crosby*, 174 Fed. 96.

*B'd of Com. of Denver v. Home Sav. Bank*,  
200 Fed. 28.

*Morril v. Jones*, 106 U. S. 466.

## V.

The defense of estoppel is not available in a federal court of equity unless specially pleaded.

*Bates Fed. Equity Procedure*, Secs. 310-312.

*Penn. Co. v. Cole*, 132 Fed. 668.

*Mesa Market Co. v. Crosby*, 174 Fed. 96.

*Mayberry v. Louisville & J. Ferry Co.*, 60 Fed. 645-6.

*In re Stoddard Bros. Lbr. Co.*, 169 Fed. 190;

*Affirmed Mock v. Stoddard*, 177 Fed. 611.

*Morse v. United States*, 41 App. D. C., 374.

This is the rule in Oregon.

*Rugh v. Ottenheimer*, 6 Ore. 231.

*Remillard v. Prescott*, 8 Ore. 37.

*Gladstone Lbr. Co. v. Kelly*, 129 Pac. 763.

*Lane v. Myers*, 141 Pac. 1022.

## VI.

Issues not tried in the lower court will not be heard for the first time on appeal.

*Mesa Market Co. v. Crosby*, 174 Fed. 96.

*The Chusan*, 5 Fed. Cases, No. 2717.

## VII.

Questions cannot be imported into a case on appeal, by assignment of alleged error in the brief or otherwise, the pleadings must develop it, or no attention can be accorded same on appeal.

*Peck v. Tribune Co.*, 154 Fed. 330.

*Giles v. Harris*, 189 U. S. 475.

*Drexel v. True*, 74 Fed. 12.

*Zadig v. Baldwin*, 166 U. S. 488.

*Cornell v. Green*, 163 U. S. 80.

## VIII.

When a court has considered conflicting evidence, and made its findings and decree thereon, they must be taken as presumptively correct unless an obvious error has intervened in the declaration of the law, or some serious mistake has been made in consideration of the evidence.

*Gorham Mfg. Co. v. Emery, etc. Dry Goods Co.*, 104 Fed. 243.

*Manhattan L. Ins. Co. v. Wright*, 126 Fed. 88.

*Vanderbilt v. Bishop*, 199 Fed. 420.

## ARGUMENT.

It is apparent from a mere reading of appellant's brief that counsel for appellant has placed no reliance whatever upon his assignments of error. This is evident as counsel in his argument predicates his demand for a reversal of the decree upon four propositions therein stated, no one of which is brought before this court by an assignment of error, or even remotely suggested to the court under the assignments of error set out in appellant's brief. Attention of the court is called to appellant's assignments of error:

Assignment No. I merely states that the trial court erred in granting the rescission of a certain contract to which reference is therein made.

Assignment of Error No. II consists of a mere statement that the trial court erred in decreeing the

return of the money paid on the contract referred to in the first assignment of error.

Appellant's assignments of error III and IV, and V and VI, are of like tenor and effect as assignments I and II, respectively.

Appellant's assignment of error No. VII is confined to a mere statement that the trial court erred in rendering a decree and judgment in favor of the plaintiff for a certain sum of money and costs.

Appellant's assignment of error No. VIII merely recites that the trial court erred in not entering a decree in favor of appellant instead of for plaintiff.

Appellant's assignment of error No. IX merely recites that the trial court erred in deciding the case in favor of the wrong party.

## I.

Rule 11 of the Circuit Court of Appeals provides that "the plaintiff in error or appellant shall file with the clerk of the court below, with his petition of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged, \* \* \* and errors not assigned according to this rule will be disregarded, but the court may at its option, notice a plain error not assigned."

The errors assigned by appellant do not comply with this rule of the court in that they fail to state

such alleged errors with a particularity that will enable this appellate court to review the determination of the lower court. This objection is true as to each and all of appellant's assignments of error.

There is no attempt made in any of the assignments of error to in any way indicate or point out the particular fact or point of law upon which error of the lower court may be predicated, and for this court to modify the decree upon strength of the assignments of error made or any of them, would be for it to make a complete examination of the record on its own initiative and to say therefrom that the decree of the lower court was against the equity of the case, although no definite issue of fact or point of law had been presented to it for particular consideration.

In the case of *Richardson v. Walton*, 61 Fed. 635, the suit being one to reform articles of dissolution between partners on the ground that they had been procured by fraud and duress, the court held that it would not review the determination of the lower court in the absence of an assignment of error which directed its attention to the precise error alleged and relied upon. At page 536 of the opinion, the following statement appears:

"That the burden was upon the complainant to establish the fraud he alleged, by clear and satisfactory proof, is unquestionable; and that he failed to do so, our examination of the record

has entirely satisfied us. But, if this question of fact had been a doubtful one, this court would not have been disposed to review the finding of the court below with respect to it, in the absence of any assignment specifically pointing out, and indicating with particularity, the precise error alleged and relied upon."

The same point was before the court for its determination in the case of *Metropolitan National Bank v. Rogers*, 53 Fed. 776, cited in the case of *Richardson v. Walton*, *supra*. At page 780 of the opinion the rule is laid down, "Where error is alleged in the findings of fact by a lower court, the assignment, to entitle it to consideration in the appellate court, should specifically and plainly point out the particular error alleged."

## II.

There is the further objection to each of appellant's assignments of error, in this, that they are too general to be noticed. In the case of *Florida Cent. & P. R. Co. v. Cutting*, 68 Fed. 586, one of the errors urged was:

"That the court erred in making its order and decree herein dated the 9th day of February, A. D. 1895, on exception to the master's report in the above entitled case." The court held: "That such an assignment did not state any particular error, in that it did not indicate to the court or counsel in what respect the court erred. In

fact the assignment is nothing more than the court erred in deciding the case at all."

In the case of *Doe v. Waterloo Min. Co.*, 70 Fed. 455, it was held that an assignment of error stating that "there is error in said decree in this, that the court, upon the whole evidence, should have rendered a decree in favor of the complainant," is too general to be noticed.

In the case of *Hart v. Bowen*, 86 Fed. 877, it was held that an assignment of error which "complains that the court entered judgment in favor of the plaintiffs and against the defendants," was too general to be noticed.

In the case of *Oswego Township v. Travelers Ins. Co.*, 70 Fed. 225, it was held that "assignments of error which merely states that the court erred in admitting and rejecting testimony, that the verdict is contrary to the law, and not supported by the evidence, and that the court erred in instructing the jury to find a verdict for the plaintiff, and in rendering judgment for plaintiff, brings nothing to the attention of the appellate court, and totally fails to comply with Rule 11 of the Circuit Court of Appeals."

To like effect is the holding of the court as to a similar assignment in the case of *Supreme Lodge K. of P. v. Wethers*, 89 Fed. 160.

In the case of *Sov. Camp W. O. W. v. Jackson*,

97 Fed. 382, it was held that "an assignment and specification of errors in an equity case, which in effect, only charge that the decree was erroneous in being for the wrong party, and suggest none of the questions of fact or law argued in the brief, will be disregarded and the appeal dismissed."

### III.

The appellant, on pages 13 and 14 of his brief, has attempted to aid his assignment of errors by stating four propositions upon which he relies to secure a reversal of the decree in this case, claiming that the evidence sustains the contentions so made. Objection is made to this effort on the part of the appellant to aid his assignment of errors, which are too general in their terms to be noticed, more particular in his brief, and the court's attention is called to the rule enunciated in the case of *Doe v. Waterloo Min. Co.*, *supra*, in which case it appears that there were nine assignments of error in the transcript, all of which were in too general terms to be noticed. In the brief seven additional assignments of error were made, and appellant contended that these additional assignments were only specifications under the first assignment, in the transcript. The court held that, "The attempt to make the assignments of error more particular in a brief is not proper. It is in fact an attempt to amend the record in this particular without permission of court."

The decision of the court in the case of *Sov. Camp W. O. W. v. Jackson*, *supra*, dismissed the appeal, re-

fusing to consider questions of fact and law discussed in appellant's brief not "set out separately and particularly in the assignments of error" in the transcript.

#### IV.

While none of appellant's assignments of error bring to this court's attention the questions of fact or law discussed under the third and fourth statements of fact set out on pages 13 and 14, of appellant's brief, which counsel contends is shown by the evidence, we submit to the court that this will avail not, as appellant has failed to assert either of the defenses in his answer in the lower court, which he now seeks to inject into the record, without even the formality of an assignment of error, but by mere assertion thereof and argument thereon in his brief. (See Appellant's Answer, Record, pp. 32 to 40.)

This is clear from the decision in the case of *Bates v. Coe*, 98 U. S. 32-47, wherein the court held, "nothing can be assigned as error which contradicts the record, nor can the appellant be allowed to assign for error the ruling of the court in respect to any defense not set up in his plea or answer. Appellate courts cannot amend the pleadings, nor can they allow the same to be accomplished by an assignment of error."

In the case of *Johnsonburg Brick Co. v. Yates*, 177 Fed. 389, the court held that "the statute of limitations cannot be first set up in the Circuit Court of Appeals."

In the case of *Mesa Market Co. v. Crosby*, 174 Fed. 96, it was held, "Where no other than issues of fact were joined in the lower court upon the pleading of a counterclaim, the question whether the defendant was barred by estoppel from maintaining such counter claim cannot be considered for the first time in the appellate court."

In the case of *B'd of Com. of Denver v. Home Sav. Bank*, 200 Fed. 28, it was held that the question "whether a board of commissioners of a city and county had authority to issue a certificate of indebtedness in the form of a negotiable instrument would not be reviewed on appeal where it had not been presented to the trial court."

In the case of *Morril v. Jones*, 106 U. S. 466, where upon argument it was contended that judgment below was right because it appears from the testimony which had been incorporated in the bill of exceptions "that the importation was from Prince Edward Island, it was not from 'beyond the seas'." The court held, "it is sufficient answer to this objection that no such point was made below."

## V.

Under appellant's fourth contention in his brief (page 14), counsel seeks to raise as an issue on appeal a defense not presented to the lower court, and about which there is not one word in the entire record of this case, and for the first time presented to this court in appellant's brief, it is this: Appellant

insists "that plaintiff is estopped to seek a rescission of the assigned contracts."

The leading case on this proposition which clearly enunciates the rule in the federal courts is, *Penn. Co. v. Cole*, 132 Fed. 668, holding that "the defense of estoppel in a Federal Court of Equity is not available unless specially pleaded and cited with approval, to like effect. Bates Fed. Equity Procedure, Secs. 310-312."

The case of *Mesa Market Co. v. Crosby*, 174 Fed. 96, the court held, "Where no other than issues of fact were joined in the lower court upon the pleading of a counterclaim, the question whether the defendant was barred by estoppel from maintaining such counterclaim cannot be considered for the first time in the appellate court."

In the case of *Mayberry v. Louisville, etc. Ferry Co.*, 60 Fed. 645, at page 656, a case where appellant sought to avail himself of an estoppel in the appellate court, the court refused to consider the question because it had not been considered or even thought of in the trial court, holding, "An estoppel by recitals in a contract, being a species of estoppel *in pais*, cannot be availed of, when not specially pleaded."

In the case, *In re Stoddard Bros. Lbr. Co.*, 169 Fed. 190, (U. S. D. C. Idaho) Dietrich, Judge, held, where objections were made by certain creditors to the allowance of certain claims on the ground that the claimant was in fact a member of the bankrupt

concern, "that estoppel is a defense, which must be affirmatively pleaded and proved by one seeking to avail himself thereof;" and upon appeal by Mock, one of the objecting creditors, to this court, in the case of *Mock v. Stoddard*, 177 Fed. 611, this ruling of the lower court was sustained.

In the case of *Morse v. United States*, 41 App. D. C. 374, the court held that "the objection that a party is estopped on the pleadings to assert a vital fact cannot be successfully interposed for the first time on appeal."

It is also the rule in Oregon that estoppel is not available unless pleaded. Boise, Judge, in the case of *Rugh v. Ottenheimer*, 6 Ore. 231, held, "an estoppel, to be relied on as a defense, should be pleaded, and when not done cannot be considered in the case." Also in an opinion by the same judge in the case of *Remillard v. Prescott*, 8 Ore. 38, at page 44, in an equity case, held that "appellant's seeking to claim title by estoppel, if they intended to rely on such title, they should have pleaded it in the complaint as they had an opportunity to do so, and therefore the matter of estoppel cannot be considered in the case." The same rule was adhered to by the Oregon Supreme Court in the case of *Gladstone Lbr. Co. v. Kelly*, 129 Pac. 763, in equity, holding "the defense of estoppel cannot be considered when not pleaded." To like effect the same court in the case of *Lane v. Myers*, 141 Pac. 1022, in equity, held, an equitable estoppel to be available must be pleaded.

## VI.

It is manifest therefore that since appellant did not tender issue in the lower court on either of the propositions numbered 3 and 4, in his brief, that he cannot be heard in this court, under the rule that "issues not tried in the lower court will not be heard for the first time on appeal." This is the rule enunciated in the case of *Mesa Market Co. v. Crosby*, *supra*, holding that the defense of estoppel could not be urged for the first time on appeal. Also in the case (in equity) *The Chusan*, 5 Fed. Cases, No. 2717, holding that defendant on appeal will be confined to defenses set up in his answer.

## VII.

Questions cannot be imported into a case on appeal, by assignment of alleged error in the brief or argument, the pleadings must develop it, or no attention can be accorded same on appeal. The attention of the court has already been called to the fact that the two defenses urged by appellant in his brief under propositions 3 and 4, were not brought to this court by any assignments of error, nor do such defenses appear in the appellant's answer in the lower court.

In the case of *Peck v. Tribune Co.*, 154 Fed. 330, the court held, "questions not raised in the lower court will not be considered on appeal," and in the case of *Giles v. Harris*, 189 U. S. 475, the court held that, "jurisdictional amount cannot be raised for the first time on appeal." In the case of *Drexel v.*

*True*, 74 Fed. 12, the court stated, "It is the province of an appellate court to review the rulings of the trial court on questions actually brought to the attention of the trial court and decided by it;" and held, "objections other than those going to the jurisdiction of the court, not presented to the trial court, will receive no attention on appeal."

In the case of *Zadik v. Baldwin*, 166 U. S. 488, the court held, "Assignments of error cannot be used to import a question not in issue or determined below." Also the case of *Cornell v. Green*, 163 U. S. 80, it was held, "An assignment of error cannot be availed to import questions into a cause, which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court, under the fifth section of the act of March 3, 1891." In this last case the appellant sought a reversal of a decree by an assignment of error, "that said finding deprived said complainant of his property without due process of law."

### VIII.

In his brief counsel for appellant devotes a considerable portion of his argument to a discussion of the question as to whether the evidence justified the lower court in determining that false and fraudulent representations were made inducing the making of the contracts. Counsel does not predicate his argument upon any assignment of error.

This is evident from the fact that counsel in writ-

ing his brief not having brought this question to the court's attention by an assignment of error, seeks to have this court examine the evidence adduced upon the trial. This court's attention is called to the opinion of the lower court, which appears on pages 219 and 222, inclusive, of the Record, from which it will be readily ascertained that to review the lower court's findings on the question of fraud it would be necessary to examine almost the entire record to determine whether the lower court was justified in its conclusions. We do not feel called upon to discuss this question, since in the absence of an assignment of error the question is not before this court for consideration, and in view of the authorities already cited and discussed in this brief counsel will not be permitted to inject the question into the record by a mere argument thereof in his brief.

In the case of *Gorham Mfg. Co. v. Emery, etc. Dry Goods Co.*, 104 Fed. 243, the court held, "When a court has considered conflicting evidence, and made its findings and decree thereon, they must be taken as presumptively correct, unless an obvious error has intervened in the declaration of the law, or some serious mistake has been made in the consideration of the evidence."

Likewise in the case of *Manhattan L. Ins. Co. v. Wright*, 126 Fed. 88, it was held "the finding and decree of a court of equity are presumptively right and they should not be disturbed or modified by the appellate court unless an obvious error has inter-

vened in the application of law or some grave mistake has been made in the consideration of the facts.”

In the case of *Vanderbilt v. Bishop*, 199 Fed. 420, this court emphasized the rule in this language, “Findings of the trial judge in an equity suit based upon the evidence of witnesses before him and resulting in a substantial conflict with respect to material issues, will not be set aside on appeal.”

### CONCLUSION.

In the absence of any assignments of error meeting the requirements of Rule 11, of this court, there is no question of fact or law properly before this court for consideration, and the decree of the lower court is conclusive upon appellant and should be affirmed and this appeal dismissed.

Respectfully submitted,

E. A. LUNDBURG,

Solicitor for Appellees Hart.

### CERTIFICATE.

I, E. A. Lundburg, solicitor for appellees Hart, hereby certify that the foregoing is a true and correct copy of the said Appellees' Brief, and of the whole thereof, in the within entitled cause.

.....

Solicitor for Appellees Hart.

### ACKNOWLEDGMENT OF SERVICE.

State of Oregon, County of....., ss.

I hereby acknowledge service of Appellees' Brief in the within entitled cause, on me in..... County, Oregon, this.....day of....., 1916, by receipt personally of a duly certified copy thereof.

.....

Attorney for Appellant W. C. Harding Land Company.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

MRS. GLENN D. HART and  
GLENN D. HART,

*Appellants,*

VS.

WALTER ADAIR, J. T. EPPERLY, JAMES  
P. BURNS, F. S. GREEN and L. B.  
WALLACE,

*Appellees,*

VS.

W. C. HARDING LAND COMPANY, a cor-  
poration,

*Appellant,*

VS.

MRS. GLENN D. HART and  
GLENN D. HART,

*Appellees.*

Brief of Appellants Hart

On Appeal from the District Court of the United  
States for the District of Oregon.

E. A. LUNDBURG,

Solicitor for Appellants Hart.





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E. A. LUNDBURG,

Solicitor for Appellants Hart.

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Brief of Appellants Hart

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STATEMENT OF THE CASE.

This is a suit brought by Mrs. Glenn D. Hart and Glenn D. Hart, her husband, appellants, in the United States District Court of Oregon, against

the W. C. Harding Land Company, an Oregon corporation, (hereinafter called "Land Company"), and Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, defendants.

The individual defendants, above named, are appellees in this court.

In the lower court Mrs. Hart secured the rescission of three contracts of purchase of land in Douglas County, Oregon, entered into between herself and assignors with the Land Company. Rescission was granted by the lower court upon the grounds alleged in the complaint that the Land Company made false and fraudulent representations of material facts in regard to the subject matter of the contracts which were relied upon by Mrs. Hart and her assignors, and induced them to enter into the contracts to their injury, and the lower court in its decree entered a judgment against the Harding Land Company for the return of the moneys paid on the purchase price under each of the contracts rescinded, but denies appellants Hart a judgment therefor against the defendants Adair, Epperly, Burns, Green and Wallace as prayed for in appellants' complaint. It is from the decision of the lower court denying a judgment against the individual defendants that appellants Hart have prosecuted this appeal.

The contracts rescinded were for the purchase of Lots 17, 18, and 19, respectively, in Plat D, Roseburg Home Orchard Tracts, which property is located in Douglas County, Oregon. It was alleged

in the bill that as to each of the contracts rescinded that the Land Company was the agent of the land owners, appellees herein, in negotiating the sale of the land, and therefore personally liable upon rescission on the ground of fraud for the return of the moneys paid upon purchase price under each of the contracts respectively.

While it is true that as to each of the contracts the purchaser dealt only with the Land Company and each of the contracts were made in the name of the Land Company, and the owners of the land were unknown to the purchaser, until after the contracts were made, the appellants contended in their bill of complaint and upon the trial of the cause that the appellees, land owners, were liable as undisclosed principals for the return of the money secured by the fraud of their agent the Land Company and that the lower court erred in not entering a decree against the appellees herein for the return of the money paid under the contracts rescinded.

There is no controversy as to the facts to be considered by this court in deciding the questions for consideration on appeal in this case.

Let us note the allegations of the bill as to the relation of the Land Company and the appellees, land owners, under the contracts made with Mrs. Hart and her assignors, rescission of which was granted by the lower court. The allegations are:

“That on the 24th day of March, 1910. and for some time prior thereto, the defendants, Walter

Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, were, and had been, the owners in fee simple of that parcel of real property, situated in the County of Douglas, State of Oregon, platted and known as 'Plat D, Roseburg Home Orchard Tracts.'

That said owners of said property under and by virtue of a certain agreement by and between said owners and the W. C. Harding Land Company, a corporation, organized and existing under the laws of the State of Oregon, granted a certain beneficial interest and equity in said tract of land to said corporation, for the purposes of exploitation and sale of the same by tracts and parcels according to terms and conditions in said agreement set out and contained; that by the terms of said agreement said W. C. Harding Land Company was duly authorized to solicit purchasers and make sales thereof under the name of the W. C. Harding Land Company, and the proper officers of the same were to sign the contracts, but deeds thereof to be given by said owners by their trustee.

That as a consideration for said services rendered and to be rendered by said corporation thereunder, said beneficial interest and equity in said land, platted and known as Plat 'D,' Roseburg Home Orchards Tracts, Douglas County, Oregon, was granted by said owners and consisted of a certain per cent based upon an agreed minimum price of \$200 per acre; that in addition thereto said W. C. Harding Land Company were privileged

and permitted to enter into contracts on its account and to its further benefit for the planting, cultivating and caring for orchards on said tracts with possible investors making same a part of any or all contracts of sale therefor.

That said arrangement and agreement between the defendants herein, the said owners, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace and the W. C. Harding Land Company, was in writing, and a copy thereof marked exhibit 'A' is herewith attached and made a part of this complaint." (See Record, pages 4 and 5.)

Exhibit "A," which was attached to and made a part of the bill of complaint, appears in the Record, pages 52 to 67, as Plaintiff's Exhibit "A" and to which reference will be made later.

It appears that in the early part of the year 1909 W. C. Harding, the president of the W. C. Harding Land Company, an Oregon corporation, one of the defendants in this suit, entered into a deal whereby the defendants Adair, Epperly, Burns, Green, appellees herein, and one C. H. Carney, purchased what was known as the Rice & Rice ranch, a tract of land consisting of 461 acres of land lying near the town of Wilbur, in Douglas County, Oregon, paying therefor at the rate of \$50 per acre. It was the purpose and intention of the appellees in acquiring the Rice & Rice ranch, to plat the same and sell the same through the Harding Land Company, as orchard land. It ap-

pears also that Wallace, one of the appellees herein, was not one of the original purchasers, but shortly after the purchase of the Rice ranch, acquired the interest of one C. H. Carney therein.

Upon the purchase of the Rice ranch the new owners entered into a contract in writing with the Land Company, under date of July 1, 1909, (See Record, Plaintiff's Exhibit "A," pages 52 to 67), for the subdivision and sale of said ranch, wherein it was provided that the Land Company was to have entire management of the sale of said tracts, as subdivided, for a period of one year from date, provided it made every effort to consummate the sale of said property. It was also expressly understood that unless the Land Company during said year negotiated at least \$60,000 worth of bona fide sales of said property, it would forfeit any equity in the contract, other than the commissions to be paid.

It was further understood that the tracts were to be sold at the rate of \$200 per acre, unless otherwise agreed to in writing.

The contract also provided that as fast as the land sales were consummated the first \$13,000 of contracts were to be placed in the Douglas National Bank in favor of Napoleon Rice and associates from whom the owners purchased the property, and the next \$10,000 of contracts shall be and become the property of the new owners of the property and the balance of the contracts and property shall be divided between the owners and the Land Com-

pany.

It was also agreed that all cash taken in from the sale of the tracts, except  $17\frac{1}{2}$  per cent commission allowed the Land Company on the selling price of \$200 per acre, to cover expense of exploitation and sale of the land, shall be and become the property of the land owners, the same to be credited upon the \$10,000 to be returned to the land owners, until paid.

The contract also provided that the land owners were not to be held responsible in any way for the planting contract and care of the trees that the Land Company makes with possible investors, nor were the land owners to benefit by the added price for planting and care.

It was also understood and agreed that the tracts were to be sold under the name of the W. C. Harding Land Company, and the proper officers of the same to sign the contracts, but deed only to be given by the owners or their trustee.

The above agreement as outlined was on September 10, 1910, merged into a supplemental agreement, between the appellees herein, (L. B. Wallace, having in the meantime succeeded to the interest of C. H. Carney), and the W. C. Harding Land Company.

In the contract as amended then follows a list of twenty-five purchasers of tracts in Plat "D," Roseburg Home Orchard Tracts, to whom contracts were issued prior to September 6, 1910, among which Glenn D. Hart and Mrs. Glenn D. Hart are

shown as purchasers of Lots 19 and 18, respectively, and the list shows contracts issued wherein the aggregate price of the land sold is \$72,614.50.

The amended contract after stating that the Land Company in making said contracts with said purchasers had included and embodied in one contract an agreement for the sale of the land, and also an agreement for the planting of the land to trees and the cultivation thereof for a period of three years, and also stating that the Land Company had failed to deposit in the Douglas National Bank the contracts required by the provisions of the agreement under date of July 1, 1909, and that for such reasons it was to the interests of the Land Company and appellees herein that a new agreement be entered into modifying the agreement of July 1, 1909, and also embodying new covenants and conditions which the said parties have mutually accepted. Then follows the amended contract, which in effect briefly provides under paragraphs as follows:

1. That to pay a mortgage of \$13,061 given to Napoleon Rice and associates to cover the balance of the purchase price of the property as provided in the former agreement and to refund the \$10,000 advanced by the appellee on the purchase price of the property that the Land Company shall at the time of the execution of this amended contract deposit a sufficient number of the contracts entered into with purchasers to equal \$23,061 at the rate of \$200 per acre, with the Douglas National Bank,

providing, however, that the appellees were not to share in that portion of the amounts due under the contracts of sale for the planting and care of the trees, and also providing that the Land Company was to assign and transfer said contracts to appellees and include in said assignment a provision to the effect that appellees shall not be liable to cultivate and care for the lands embraced in said contracts. It was also provided in the amended contract that the Land Company was to guarantee the performance of the contracts on the part of the purchasers. The contract then provides for a division of the receipts under the contracts deposited and the application and payment thereof by the bank to the parties entitled to the same.

2. The contract then provides that all contracts in hand 90 days after date thereof shall be deposited in trust for collection in a bank to be agreed upon by B. L. Eddy for the appellees and the Land Company, under an agreement to divide equally the money received under the contracts so deposited applicable to the price of the land, after deducting the commission on sales due the Land Company.

3. The contract then provides that the Land Company may have an additional six months from date thereof, unless a further extension in writing be granted, to sell the unsold portions of the platted land, it being expressly understood that no contract of sale covering any portion of the land is to be made shall give the purchaser more than five years to make full payment, and upon every

such sale there shall be a cash payment of at least 20 per cent of the purchase price. The agreement then provides for reports of sales and division of all other contracts not deposited or thereafter entered into, and that the authority of the Land Company to make sales shall cease and determine at the end of the six months' period, and that the unsold portion of the land shall revert to the owners free from control and interest of the Land Company.

4. The contract then provides that the appellees shall convey to B. L. Eddy as trustee all of the lands which the Land Company was authorized to sell to hold the legal title in trust in order that he may execute conveyances to purchasers of parcels of said land when paid for in full, with full authority to plat the property at the expense of the Land Company.

5. The contract then provides that the deferred payments provided for in contracts shall draw 6 per cent interest per annum, and that the appellees shall be entitled to such proportion of said interest as the price of the land shall bear to the sale price of the various tracts and the Land Company shall be entitled to any interest paid upon such proportion of the deferred payments as shall be applicable to its cultivation contracts.

6. The contract then provides that the Land Company guarantees as to any sale contracts thereafter made full payment of the sums due thereunder from the respective purchasers and the Land

Company undertakes and agrees to perform the planting and cultivation features of every such contract and will at all times hold the appellees harmless from all costs, charges, expenses, damages and claims of every kind arising on account of any such contract made by the Land Company with any purchaser for planting or cultivating any of said lands.

7. This paragraph provides that in construing this agreement it is to be borne in mind at all times with reference to any settlement and division of profits or sale contracts, the appellees are not to share in any payments made on account of planting and cultivation of any of said lands, except under contracts set over and transferred to appellees on a division.

All of the contracts issued by the Land Company to Mrs. Hart and her assignors, were of the same form and substance, (same printed form being used), and in each instance the sale was made under like terms, except as to payments, and all contracts issued by the Land Company to purchasers of property in Plat "D" conformed to the terms and conditions imposed thereon under the appellees' contract with the Land Company.

The contract for the purchase of Lot 18 made with Mrs. Hart by the Land Company appears in full in the Record (see pages 67 to 70, Plaintiff's Exhibit "E"), and bears the date of March 24, 1910.

The contract for the purchase of Lot 19 made with Mrs. Hart's assignor Glenn D. Hart, bears

date of March 24, 1910. (See Plaintiff's Exhibit "F," Record, page 70.)

The contract for the purchase of Lot 17 made with Mrs. Hart's assignor Mrs. Ella Peterson, while bearing date of October 15, 1910, was in fact entered into on April 15, 1910, upon which date the contract acknowledges the payment of \$100. (See Record, page 71, Plaintiff's Exhibit "G.")

The court's particular attention is called to the fact that it appears from the contract between the appellees and the Land Company that it was the clear understanding between the parties to that contract that the Land Company in making contracts with purchasers might include in such sale contract an agreement for the planting and cultivation of the tracts sold.

This fact is further demonstrated by the testimony of W. C. Harding, the president of the Land Company. He testified:

"If these people (appellees) purchased the Rice & Rice ranch, we proposed subdividing and selling it as orchard land, which they understood. It was the suggestion prior to the time they purchased that it was to be planted where the owner desired." (See Record, page 168.)

In keeping with the agreement between the appellees and the Land Company, the appellees deeded the Rice ranch to B. L. Eddy as trustee on September 10, 1910, a copy of which deed appears on pages 65 to 67 of the Record, as Plaintiff's Exhibit "B," in which deed following the description of the prop-

erty conveyed, portions of which were platted as "Plat D," Roseburg Home Orchard Tracts, the purposes of the trust was set forth in the following language, to-wit:

"To have and to hold to the said B. L. Eddy forever in trust, however, to hold and dispose of the same for the benefit of the grantors herein, with full power and authority in said trustee to make, execute and deliver deeds, conveyances, contracts and assurances of title with covenants of warranty, conveying said lands in suitable parcels, when paid for in full, to purchasers thereof through the W. C. Harding Land Company, a corporation, incorporated, organized and existing under the laws of the State of Oregon, and having its principal office at Roseburg, Oregon, in accordance with the terms of a certain agreement in writing providing for the sale of said lands and dated September 10, 1910, and executed on the one part by the grantors herein and on the other part by the said W. C. Harding Land Company. And in case there shall be any residue of said land remaining unsold through or by the said W. C. Harding Land Company under the terms of said agreement of September 10, 1910, and after the termination of the authority of said W. C. Harding Land Company to make sales thereof, such residue of land shall be reconveyed by said trustee to the grantors herein, or their assigns. And the said trustee is duly authorized and empowered to make, execute, acknowledge, and file for record in the office of the County Clerk of

Douglas County, Oregon, a plat and dedication of said lands dividing the same into tracts and laying off and designating roadways through the same, and to do whatever may be incidental to the proper platting of said tract, in accordance with the statutes of the State of Oregon, in that behalf provided.

And we, the grantors above named, do covenant to and with the grantees of our said trustee, and grantees being those hereafter named in deeds to be executed by said trustee, that the above granted premises are free from all incumbrances excepting a mortgage for the principal sum of thirteen thousand and sixty-one dollars and interest, made in favor of N. Rice and associates and recorded in the Records of Mortgages of Douglas County, Oregon, which mortgage the grantors herein are to pay and discharge as required by its terms; that we will and our heirs, executors and administrators shall and will forever warrant and defend the title of the above granted premises and of the respective parcels thereof to be conveyed by our said trustee to the grantees thereof, their heirs and assigns forever."

It is the contention of the appellants that upon the facts established under the pleadings, that under the law the Land Company and the appellees herein are both liable for the return of the moneys paid under each of the contracts rescinded on account of the fraudulent representations made by the Land Company in procuring the contracts, and

that the decree of the lower court is erroneous in failing to include a judgment against the appellees for the return of the moneys paid with interest on the purchase price of the land under each of the contracts rescinded.

### ASSIGNMENTS OF ERROR.

The appellants have assigned the following errors by the lower court in the decree entered November 9th, 1914, and now seek a modification of said decree to correct such errors, to-wit:

#### I.

In failing to decree that plaintiff was entitled to have relief against the individual defendants, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, owners of the land involved, as prayed for in the bill of complaint. (Record, page 232.)

#### II.

In failing to include in the decree a personal judgment against the individual defendants, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, for the return of the money paid on each of the several contracts issued by the W. C. Harding Land Company to the plaintiff and her assignors. (Record, page 233.)

### POINTS OF LAW AND AUTHORITIES.

#### I.

The original and supplemental contracts between the appellees and the Land Company was one of agency, and not of sale.

Agency created, how?

*Central Trust Co. v. Bridges*, 57 Fed. 753 at 764.

An agency contract, not sale.

*Briggs v. Foster*, 137 Fed. 773.

*In re Galt*, 120 Fed. 64, 566 C. A. 470.

*Williams Mower & Reaper Co. v. Raynor*, 38 Wis. 119.

## II.

It is a firmly established rule of law that a principal is liable upon a written simple contract entered into by an agent in his own name within his authority, although the name of the principal does not appear in the instrument and was not disclosed, and the person dealing with the agent supposed he was acting for himself, and this rule obtains as well in respect to contracts which are required to be in writing as to those where a writing is not essential to their validity.

9 Cyc. 387.

*Ford v. Williams*, 21 How. (U. S.) 287; 2 U. S. (Miller) 790.

*New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. (U. S.) 344; 16 U. S. (Curtis) 722.

## III.

An undisclosed principal may be charged with responsibility for and avail himself of the benefits of the acts of his agent; and hence when the relationship of principal and agent is found to exist in such a case, the ordinary rules of responsibility of the principal to third persons for all acts of his

agent within the apparent scope of his authority are established.

*Brooks v. Shaw*, (Mass.), 84 N. E. 110.

*Byington v. Simpson*, 134 Mass. 169.

#### IV.

A principal is bound by the fraud of his agent in making a sale, in relation to that sale,—as much so as the principal would be if acting in person; and this notwithstanding the fraud was perpetrated without the knowledge or approval, and against the consent, of the principal.

*Alger v. Anderson*, 105 Fed. 105.

*Daniel v. Mitchell*, 1 Story, 172, Fed. Case No. 3562.

The rule is the same whether the agency was disclosed or not.

*Doggett v. Emerson*, 3 Story, 700, Fed. Case No. 3960.

*Mason v. Crosby*, 1 Woodb. & M., 342, Fed. Case No. 9234.

#### V.

The appellees, under their amended contract with the Land Company expressly ratified the contracts made with purchasers which included a provision for the planting and cultivation of the tracts sold, and by receiving the benefit of all such contracts became bound by the fraudulent representations of the Land Company in securing such contracts.

Story's Equity Jurisprudence, 10th Ed., Sec. 193.

## ARGUMENT.

## I.

Whether the appellees are to be held liable for the return of the moneys paid under each of the contracts rescinded is to be determined by their legal status with respect to each of said contracts.

The lower court has determined that the Land Company made fraudulent representations of material matters which entitled the appellants to a rescission of the contracts, and a return of the moneys, with interest, paid under each of the contracts by the Land Company.

It is the contention of appellants that the appellees are equally responsible with their selling agent, the Land Company, for the fraud of the latter, and under the errors assigned, this court is called upon to determine that question as a matter of law.

The legal status of the appellees with regard to the contracts rescinded is to be determined by the construction of the contract (Plaintiff's Exhibit "A," pages 52 to 65, Record), between them and the Land Company. This construction is aided by reference to the deed (See Record, pages 65-67) from appellees to B. L. Eddy, Trustee, made pursuant to said contract as well as by a consideration of the circumstances attendant upon the purchase of the land and the making of said contract by appellees with the Land Company, a historical recital of which largely appears in the contract itself. From these sources it is clear that the

appellees purchased the Rice ranch for the sole and single purpose of having the Land Company sell it for them. The ranch contained a little over 461 acres, for which they paid at the rate of \$50 per acre, or a total of \$23,061, making an initial payment of \$10,000, and giving a mortgage to secure the payment of the balance, \$13,061. The sole purpose of the appellees in purchasing the property was for its exploitation and sale thereof by the Land Company as orchard land. Under the original contract between the appellees and the Land Company, the latter was given the exclusive authority for a period of one year to make sales of the property in tracts as platted. All but 100 acres of the property was platted. (See Plat Plaintiff's Exhibit "C," page 40, Record.)

In order to expedite the sale of the tracts and evidently for the convenience of all concerned the appellees Adair, Epperly, Burns, Green and Wallace, all of whom excepting Epperly, were married, (see Plaintiff's Exhibit "B," Record, page 65), the Land Company was authorized to make sale contracts in its own name, but the appellees or their trustee were to give deeds.

The original contract contains the following provision, "It is furthermore agreed that the selling price of this land shall be \$200 per acre, and that the party of the first part (appellees) shall not be held responsible in any way for the planting contract and care of the trees that the party of the second part (Land Company) makes with possible

investors, nor shall the party of the first part benefit from the added price that will be put onto the land for such planting and care." (See Record, page 55.)

Mr. Harding, President of the Land Company, says that he drafted this contract and that the appellees understood that where a purchaser desired the land was to be planted. (See Record, page 168.)

Under the original contract it was provided that the Land Company was to receive  $17\frac{1}{2}$  per cent commission, which it was allowed to deduct from the first cash received, and that excepting the amount retained as commission, that as fast as the sales are made that the first \$13,000 worth of contracts were to be deposited in the Douglas National Bank to pay the mortgage, and the next \$10,000 worth of contracts shall be and become the property of the appellees, and that less the commission all cash taken in from sales shall be and become the property of the appellees, until the purchase price of the Rice ranch was paid in full, and the balance of the contracts and property shall be equally divided between the parties to the contract. Appellees' contract with the Land Company bears date of July 1, 1909, and the supplemental contract was made on September 10, 1910. The court's attention has already been called to the fact that all of the sale contracts in controversy were entered into with Mrs. Hart and her assignors prior to September 10, 1910.

Under the supplemental contract the appellees renewed all of the provisions of the original selling agreement with the Land Company and recited the fact that in making sale contracts the Land Company had included and embodied in one contract for the sale of the land at \$350 per acre an agreement to plant the land to trees and to cultivate and care for the land for a period of three years. With full knowledge of the kind and character of the contracts issued to Mrs. Hart and her assignors the appellees under the provisions of their amended contract with the Land Company fully ratified the same and extended the privilege to the Land Company to make sales for a further period of six months from the date thereof, but the vital and outstanding feature of both the original and supplemental contracts with the Land Company is that on the sale price of the land under each sale contract made all the money received was the property of the appellees, less  $17\frac{1}{2}$  per cent commission retained by the Land Company. All of the contracts made under the supplemental agreement the Land Company was compelled to deposit as provided by the appellees, and out of the proceeds the Land Company in addition to  $17\frac{1}{2}$  per cent commission was to be paid that part of the sale price of the land in excess of \$200 per acre to compensate it for the cultivation and care feature of the sale contracts. It is evident however that the appellees realized that in accepting the sale contracts made by the Land Company in-

cluding the cultivation agreement that they became fully liable for the entire performance of all of such contracts made, and for that reason they required the Land Company not only to guarantee the full payment and performance of all sale contracts made on said lands described in the agreement of July 1, 1909, on the part of the respective purchasers, but future contracts made as well. Appellees' supplemental contract with the Land Company also provides that at the expiration of 90 days from its date the Land Company should render a full statement of all business transacted, and a like statement at the end of the six months extended sales period. Thus it is readily determined from the entire dealings and operation of the Land Company on behalf of the appellees, that the Land Company, under its authority to make sales, was at all times the agent of appellees, and for the services rendered received  $17\frac{1}{2}$  per cent commission, the compensation for planting and care, and after the original purchase price had been returned to appellees, the balance of the profits was divided equally between the appellees and their agent, the Land Company.

Everything the Land Company did, every contract of sale made was under the direction and control of the appellees. The terms and conditions of every contract of sale made by the Land Company were made in accordance with the direction of appellees, by their direct authority, and the appellees, if it was not their intention under their

original contract with the Land Company that the cultivation and care agreement should be incorporated in sales contracts made, they expressly ratified all such contracts made or to be made under the terms of the supplemental contract, by expressly providing that all the money received on the stated sale price of the same should be and become their property, less the commission paid to Land Company, thus receiving the benefits of all such contracts made.

So much for a general discussion of the relationship of the appellees and the Land Company under the original and supplemental contracts authorizing the Land Company to sell the land.

In the case of *Central Trust Co. v. Bridges*, 57 Fed. 753, at 764, in a case where a question of agency was to be determined, Taft, Circuit Judge, stated: "An agency is actually conferred very much as a contract is made, i. e., by agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him, and the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them."

In the case at bar the contract of agency is in writing, the appellees authorized the Land Company to sell their land, and stipulated the manner, time and conditions of sale, and the Land Company agreed to act and did act as their agent and made the contracts of sale in controversy.

Appellees' counsel in the lower court contended

that the contract between appellees and the Land Company was one of sale rather than agency. Let us examine the contract from that standpoint.

It is the appellants' contention that the contract is a contract of agency. Under no possible construction could it be termed one of sale; that is, an agreement under which the Land Company agreed to buy anything.

The money to be paid the owners under the agreement was not to be paid upon a sale to the Land Company, but upon a sale of the land by that company. In other words, it was to account for the proceeds of the sale of the land as fixed by the contract. There is wanting the essential element of a sale "an agreement to pay a price." The Land Company took upon itself no obligation of this character. It assumed no debt to the appellees.

In the case of *Briggs v. Foster*, 137 Fed. 773, the court held the contract to be one of agency where defendants, being in absolute control of a mining corporation, through three of its directors, contracted with another corporation for the sale of a large number of shares of stock held by defendants at the price of thirty cents per share, with the privilege of retaining all that the sellers secured above such price as their commission, and the sellers to pay three cents of every thirty cents received for a share of the stock to the corporation and twenty-seven cents to defendants, and held the defendants liable for fraudulent representations made by such sellers in *prospecti* issued to induce

the purchase of stock.

*In re Galt*, 120 Fed. 64, 56 C. C. A. 470, where the contract provided that the second party thereto should account for 60 per cent of the list price of goods sold, and would pay cash or give his notes for the goods on hand at the expiration of 12 months, if required by the first party, it was held that the contract was a contract of agency, and not of sale.

In the case of *Williams Mower & Reaper Co. v. Raynor*, 38 Wis. 119, the court held, a contract that the second party might sell, that he should pay a fixed price in farmer's notes or cash; that he should guarantee the notes; that the goods should be invoiced to him as bought; that the first party should have the option to require the second party to pay the stipulated prices of those remaining at the end of the season, was held to constitute the second party as agent, and not a purchaser. This is the legal effect of the contract between the appellees and the Land Company. In that contract the Land Company had power to sell, but the proceeds of the sale to the extent of the fixed price of the property, less commission, was the property of the appellees for which the Land Company would have been liable for embezzlement if they had not accounted. See *Briggs v. Foster, supra*.

## II.

As to each of the contracts rescinded, made by Mrs. Hart and her assignors with the Land Company, at the time of the execution of said contracts

the appellees' interest in the transactions was unknown to the purchasers, appellants contend however that the appellees are bound under each of said contracts made by their duly authorized agent, that the contracts were made in the name of the Land Company for their benefit.

This liability exists under the rule stated in 9 Cyc. 387, to-wit: "It is a firmly established rule of law that a principal is liable upon a written simple contract, entered into by an agent in his own name, although the name of the principal does not appear in the instrument and was not disclosed and the person dealing with the agent supposed he was acting for himself, and this rule obtains as well in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity." This rule was followed in the case of *Ford v. Williams*, 21 How. (U. S.) 287; 2 U. S. (Miller) 790, where an undisclosed principal sought to enforce such a contract, and the court held, "The contract of the agent is the contract of the principal and he may sue or be sued thereon, though not named therein, and notwithstanding the rule of law that an agreement reduced to writing, may not be contradicted or varied by parol, it is well settled that the principal may show that agent who made the contract in his own name was acting for him. This proof does not contradict the writing, it only explains the transaction."

Also, "When a party deals with the agent, with-

out any disclosure of the fact of his agency, he may elect to treat the after discovered principal as the person with whom he contracted."

Under this rule, therefore, the appellees cannot deny the binding force and effect upon them of the contracts in controversy.

### III.

It having been determined that the appellees cannot escape responsibility upon the contracts because they were made in the name of the Land Company.

Let us consider the application of the rule "an undisclosed principal may be charged with responsibility for and avail himself of the acts of his agent, and hence when the relationship of principal and agent is found to exist in such a case, the ordinary rules of responsibility of the principal to third persons for all acts of his agent within the apparent scope of his authority are established. In the case of *Brooks v. Shaw*, (Mass.), 84 N. E. 110, one Shaw bought an express company operating between Boston and Cambridge from one Sawin who operated it under the name "Sawin's Express." Shaw, without notice to the public, continued to operate it under the same name and continued Sawin in his employ as manager as before.

Sawin was restricted in the settlement of all claims without consulting Shaw except for sums less than \$3.00. One B sent a fine dress by Sawin's Express from Boston to Cambridge under a contract limiting the liability for loss to \$50. B sup-

posed she was dealing with Sawin as principal and having no notice of Shaw's ownership and control of the Sawin's Express. Sawin told B to get a new dress and he would pay for it, but Shaw refused to carry out Sawin's settlement. B instituted an action against Shaw and was permitted to recover the value of the dress, under the rule last stated. In the case of *Byington v. Simpson*, 134 Mass. 169, the court, discussing the application of the same rule, held "The doctrine that an undisclosed principal may be charged with responsibility for and avail himself of the benefits of the acts of his agent is well settled."

In the case at bar the appellees under their contract with their agent, the Land Company, and the supplement thereto, have availed themselves of the full benefit of the contracts rescinded and are therefore chargeable with all acts of their agents in securing the same.

#### IV.

It is therefore the contention of the appellants that the appellees are bound by the fraud of their agent in making the sale, as to each of the contracts which have been rescinded because of the fraudulent representations in securing the same, in relation to each particular sale, as much so as if they had in fact entered into each of the contracts rescinded in person, and this notwithstanding the fraud was perpetrated without their knowledge or approval.

In the case of *Alger v. Anderson*, 105 Fed. 105,

this was a suit for the rescission of a contract of purchase of coal and timber lands in Tennessee, and to secure the return of the moneys, with interest paid thereon. Anderson, the owner of the land, had, it appears, given a title bond to Sheridan and Green, doing business under the name of Sheridan, Green & Co., who at the time of receiving the option, were already negotiating with the knowledge of Anderson for the sale of the lands under an agreement that they should have all over a certain price per acre received.

Sheridan and Green made false representations to Alger, inducing the purchase of the land. The court held that the title bond was secured by Sheridan and Green to insure their profit, and that the agency in fact existed. and that Anderson was responsible for the fraud of the agents by which the sale was induced, although he had no knowledge thereof.

In the case of *Daniel v. Mitchell, et al.*, 1 Story, 172, Fed. Cases No. 3562, Todd, the holder of the title bond, had also an agreement that he should sell the land, and receive one-half of the excess over \$4.00 per acre, if he should succeed in making a sale. Todd employed one Haskins to aid him in effecting a sale and made the contract of sale in his own name. Rescission was granted of the contract. All the owners were held liable in aid of Todd, against whom a decree went as having received all of the purchase money, from his having acted as their agent. Todd was held to be the

agent of the owners for the reason that an agreement was tacked on the title bond that Todd should sell and be compensated by the excess over a given price. He therefore sold for the owners and was their agent.

In *Doggett v. Emerson*, 3 Story, 700, Fed. Cases No. 3960, Emerson, acting for himself and others owning land, gave to Williams a title bond, agreeing to make title on being paid a stipulated price per acre. Williams made a sale and Emerson and associates caused deed to be made by the state direct to the purchasers. Williams made untrue representations to induce the sale. The owners were held liable for his misconduct, upon the ground that the evidence showed that the real relation was that of principal and agent and that the title bond was given to conceal the agency of Williams, who was given all that he could realize over a fixed price. In *Mason v. Crosby*, 1 Woodb. & M., 342, Fed. Cases No. 9234, the facts were much the same as those in *Doggett v. Emerson*, *supra*. It might be mentioned in passing that the three last cases cited were tried before that eminent jurist, Justice Story, and that the opinion written in the case of *Mason v. Crosby*, *supra*, was perhaps the last penned by him, the decree thereon was entered by his successor. Applying the law as asserted in these decisions of Justice Story as well as in the case of *Alger v. Anderson*, *supra*, to the facts in the case at bar, it would seem that the liability of the appellees for the fraud of the Land Company

as to the contracts in controversy is so evident as not to call for further discussion.

## V.

A discussion of the question before the court would not be complete however without reference to the "planting and cultivation feature of the contracts rescinded." Under the facts as alleged in the bill and established by the evidence, all of which are set out in the statement of the case, it appears that the appellees, with full knowledge of the kind and character of the sale contracts made by their agent, the Land Company, which included the planting and cultivation feature, formally ratified such contracts under the terms of their supplemental contract with the Land Company, by retaining the benefits of all such contracts made by their selling agent. They must be held to have ratified such contracts when they provided for the retention as their property of the proceeds from all sale contracts as received, less commissions, applicable to the sale price of the land. (Plaintiff's Exhibit "A," Record, pages 52-67.)

While it is the contention of appellants that it was the intention of the appellees when they entered into the contract for the sale of the lands by the Land Company that the sale contracts made were to contain this very agreement for planting and care when the purchaser so desired the facts as to which we have already discussed, yet the appellees accepted the contracts made with the planting and care feature included and therefore

became bound by the fraud committed by their agent in securing them.

The rule is stated thus by Justice Story, "The same general principles apply, whether the fraud was perpetrated by the party directly interested, or by an agent, if the act in which the fraud was committed be adopted by the principal. If the latter persists in taking the benefits of his agent's fraud, it is immaterial whether the fraud was originally concocted by the principal or by the agent; the principal will be implicated to the fullest extent, if he adopts the acts of his agent."

"For a third person, by seeking to derive any benefit under such a transaction, or to retain any benefit resulting therefrom, becomes *particeps criminis*, however innocent of the fraud in its inception." (Story's Equity Jurisprudence, 10th Ed., Sec. 193.)

#### IN CONCLUSION.

In view of the errors assigned and for the reasons above shown the decree entered by the lower court should be modified accordingly and the appellant be granted relief against the appellees herein according to the prayer of her complaint.

Respectfully submitted,

E. A. LUNDBURG,  
Solicitor for Appellants Hart.

CERTIFICATE.

I, E. A. Lundburg, solicitor for appellants Hart, hereby certify that the foregoing is a true and correct copy of the said Appellants' Brief, and of the whole thereof, in the within entitled cause.

.....

Solicitor for Appellants Hart.

ACKNOWLEDGMENT OF SERVICE.

State of Oregon, County of....., ss.

I hereby acknowledge service of Appellants' Brief in the within entitled cause, on me in .....County, Oregon, this.....day of ..... 1916, by receipt personally of a duly certified copy thereof.

.....

Attorney for Appellees Adair, Epperly, Burns, Green and Wallace.



IN THE  
UNITED STATES CIRCUIT  
COURT OF APPEALS  
FOR  
THE NINTH CIRCUIT

Mrs. Glenn D. Hart and Glenn D. Hart,  
Appellants,

vs.

Walter Adair, J. T. Epperly, James P.  
Burns, F. S. Green and L. B. Wal-  
lace,  
Appellees,

AND

W. C. Harding Land Company, a cor-  
poration,  
Appellant.

vs.

Mrs. Glenn D. Hart and Glenn D. Hart,  
Appellees.

**BRIEF OF APPELLEES ADAIR, ET AL.**

On Appeal from the District Court of the United  
States for the District of Oregon.

B. L. EDDY,

Solicitor for Appellees Adair, et al.





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On Appeal from the District Court of the United  
States for the District of Oregon.

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B. L. EDDY,  
Solicitor for Appellees Adair, et al.

## STATEMENT OF THE CASE.

It is necessary that there should be some correction of the Statement contained in the brief of Appellants Hart. It is said that the Appellees paid \$50.00 per acre for the land, but it is not made clear that they paid \$50.00 as the average price per acre for a large tract including the land in question, and that more than 100 acres of the tract purchased was without value, and the land in question was the choicest part of the larger tract. Again it is said that it appears from the contract between the Appellees and the Harding Land Company that it was the clear understanding between the parties that the Land Company in making contracts with purchasers might include an agreement for the planting and cultivation of the tracts sold. The original contract is repeated in the contract of September 10th, 1910, beginning at page 52 of the Transcript of Record, and a reading of the two contracts shows that it was not the intention of the parties that the agreement with reference to planting and cultivation of the lands should be included in the sales contracts. It further appears from the agreement, page 55 of Transcript, tha the Harding Land Company was to make the contracts of sale in its own name, and Appellees were not to be known in connection with the sales until the time came to make deeds, after full payment.

## POINTS AND AUTHORITIES.

### I.

When a party, with knowledge of facts entitling him to rescission of a contract or conveyance, afterward, without fraud or duress, ratifies the same, he has no claim to the relief of cancellation. An express ratification is not required in order thus to defeat his remedy; any acts of recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it, have the effect of an election to affirm. "This doctrine seems to rest not upon the principle of a new contract between the parties, nor yet upon the ordinary principle of estoppel **in pais**, but rather upon a distinct principle of public policy, that all that justice or equity requires for the relief of a party having such cause to impeach a contract is that he should have but one fair opportunity, after full knowledge of the rights, to decide whether he will affirm and take the benefits of the contract or disaffirm it and demand the consequent redress. Any other rule would be regarded as unjust, even toward the party guilty of the wrong out of which grows the right to rescind."

6 Cyc. 297-8.

### II.

The general principles of waiver and laches apply in suits for rescission. The complainant must have been diligent in seeking his remedy, and must

not have slept upon his rights; and if with knowledge of the facts which give him a right to seek rescission he has been guilty of an unreasonable and unnecessary delay in availing himself of his remedy, a Court of equity will deny him relief. Similarly any conduct of the complainant sufficient to show an election by him to affirm the contract or abide by its obligations will ordinarily be sufficient to bar his right to rescission. The waiver of the right to rescind may be implied from conduct inconsistent with an intention to exercise the right; such as acquiescence in the transaction for an unreasonable length of time.

24 Am. & Eng. Enc. Law, 2nd ed. p. 625;  
Potter Realty Co. v. Breitling, (Oregon) 155  
Pac. 179.

### III.

The right to rescind a contract upon the ground of fraud may be lost by delay, as it is the duty of the person claiming to have been defrauded to act promptly upon discovery of the fraud. He cannot sit on the fence and wait for developments to indicate whether his interest will call for affirmance or rescission. If he is to rescind he must do so promptly. Acts of ownership after knowledge of the alleged fraud will preclude rescission.

Scott v. Walton 32 Or. 460, 52 Pac. 180, 181;  
Dundee Mortgage and Trust Company vs. Goodman, 36 Or. 453, 60 Pac. 3;  
Vaughn v. Smith, 34 Or. 54, 55 Pac. 99;

Elgin v. Snyder, 60 Or. 297, 118 Pac. 280;  
 Whitney v. Bissell, . . . Or. . . ., 146 Pac. 141;  
 L. R. A. 1915 D. 257;  
 Shappirio v. Goldberg, 192 U. S. 232, 48 L. ed.  
 419.  
 Grymes v. Sanders, 93 U. S. 62, 23 L. ed. 798;  
 Simon v. Goodyear Metallic Rubber Shoe Co.,  
 44 C. C. A. 612, 105 Fed. 573, 52 L. R. A. 745.

#### IV.

Under all the authorities, after a party claiming to have been defrauded has acquired knowledge of the facts, if he affirms the contract there can be no rescission

Faulkner v. Wassmer, (N. J.) 77 Atl. 341, 30 L. R. A. (N. S.) 872, and note in L. R. A.  
 14 Am. & Eng. Enc. Law (2nd ed.) 159, 161.

#### V.

The contract between the Appellees and the W. C. Harding Land Company cannot be construed as creating a partnership, if for no other reason because the Land Company, as a corporation, could not enter into a partnership.

Salem-Fairfield Tel. Ass. v. McMahan (Or.) 153  
 Pac. 788;  
 Wheeler v. Lack, et al, 37 Or. 238, 61 Pac. 849;

Hanthorn v. Quinn, 42 Or. 1, 69 Pac. 817, 18 L.

R. A. (N. S.) note at page 1089;

Corbin v. Holmes, 83 C. C. A. 367, 154 Fed. 593.

## VI.

Even though it should be held that the contract between the Appellees and the Harding Land Company created the relation of principal and agent, still the sales in question were made by a sub-agent of the Harding Land Company, and the power delegated to an agent cannot be delegated without the authority of the principal, and it is not claimed that there was any such authority in this case. The principal is not liable for the acts of the unauthorized sub-agent.

2 Corpus Juris, page 685, section 342;

Sorenson v. Smith, 65 Or. 78, 129 Pac. 757;

Winkleblack v. National Exchange Bank, 155 Missouri App. 1, 136 S. W. 712.

## VII.

If it be held that the Harding Land Company was the agent of the Appellees, it had only a restricted power to sell, that is to say, it could only find purchasers on such terms as would allow the land owners a certain price for their lands, and while it was to make contracts of sale in its own name, the Appellees only could issue deeds. An agent with restricted power to sell has no power to bind his principal by any representation as to the quality of the land.

2 Corpus Juris, page 616, section 251, and cases cited;

Samson v. Beale, 27 Wash. 557, 68 Pac. 180;

Mayo v. Wahlgreen, 9 Colorado A. 506, 50 Pac. 40.

### VIII.

Representations as to prospective profits from the peach trees cannot be relied upon as statements of fact, but amount only to expressions of opinion.

39 Cyc. 1274;

Gordon v. Parmelee, 2 Allen 212.

### IX.

The contract between the Appellees and the Harding Land Company did not create the relation of principal and agents.

Tucker v. Gibson, (Kan.) 101 Pac. 633;

Kern v. Feller, (Or.) 70 Or. 140, 140 Pac. 735;

Samson v. Beale, 27 Wash. 557, 68 Pac. 180;

Mayo v. Wahlgreen, 9 Colo. A. 506, 50 Pac. 40;

Iowa R. Land Co. v. Fehring, 126 Iowa 1, 101 N. W. 120.

### X.

Appellees cannot be charged as having ratified the contracts in question because it appears that they had no knowledge of the alleged representations prior to the filing of suit, and any apparent act of ratification would not be binding upon them so long as it appears that they had not full knowledge of all

the material facts and circumstances relative to the transaction.

2 Corpus Juris, page 476, section 93;  
O'Shea v. Rice, (Neb.) 69 N. W. 308, 310;  
Murphy v Clarkson (Wash.) 66 Pac. 51.

## XI.

If the Appellees were liable in this suit which is brought merely for rescission of contract, they should not be held liable for anything more than the money actually shown to have been paid to them. Complainant has made no effort to trace the money into the hands of the Appellees.

Daniel v. Mitchell, Fed. cases 3562, 1 Story 172;  
Mason v. Crosby, 1 Woodb. & M. 342, Fed. cases  
No. 9234;

## XII.

Assignment by the purchasers of two of the three contracts in question affirmed the contracts and prevents rescission, especially as the assignments were made after full knowledge of the facts.

Cooper v. Hillsboro Garden Tracts, (Oregon,) not yet officially reported, 152 Pac. 488.

## XIII.

Appellees cannot in any event be held liable in this suit because the contracts of sale were under seal and Appellees were not parties thereto or men-

tioned therein, and the law is well settled that an undisclosed principal cannot be held liable upon a contract under seal executed by an agent in his own name.

2 Corpus Juris, page 843, section 524, and authorities cited;

2 Mechem on Agency, 2nd ed. section 1734, and authorities cited;

Barbre v. Goodale 28 Or. 465, 472;

Willard v. Wood, 135 U. S. 309, 313, 34 L. ed. 210 at 213;

Bádger Silver Mining Company v. Drake. (C. C. A. Fifth Cir.) 88 Fed. 48, 31 C. C. A. 378;

Denike v. DeGraaf, (N. Y.) 87 Hun. 61;

Klein v. Mechanics and Traders Bank, 145 N. Y. App. Div. 615 at 617.

#### XIV.

When lack of jurisdiction appears, the court should dismiss the suit of its own motion.

Morris v. Gilmer, 129 U. S. 315, 326, 32 L. ed. 690;

Farmington v. Pillsbury, 114 U. S. 143, 29 L. ed., 114;

Minnesota v. Northern Securities Co., 194 U. S. 48, 62; 48 L. ed., 870;

Steigleder v. McQuesten, 198 U. S. 141, 142, 49 L. ed. 986.

## ARGUMENT.

Plaintiffs are attempting to hold the Appellees Adair, Epperly, Burns, Green and Wallace responsible for representations not made by them or in their names or authorized by them. The contracts of sale in question were made in the name of the W. C. Harding Land Company, as though it were the owner of the lands. Adair, et al, the land owners, were not known to the respective purchasers.

The contract between the land owners and the company expressly provided that the contracts of sale should be made in the land company's own name, and therefore the owners are not chargeable with having held the company out to the public as their agent. Had they so held the company out as agent, their liability might exceed that created by the written contract between them and the company, under well-known principles of the law of agency. The purchasers of the lots dealt with the Harding Land Company as principal, and not as agent, as shown by the contracts of purchase, which are in evidence.

The land company contracted not only to convey the land, but also to plant and cultivate. At the same time the contract between land owners, Appellees herein, and the Harding Land Company expressly provided against the land owners deriving any benefit from or suffering any burden on account

of the planting and cultivation contracts. The land owners were to have \$200.00 per acre for their land, and the company added to this price \$150.00 per acre to cover cost of platting, making sales and planting and cultivation, making the price of the land, planted and cultivated for three years, \$350.00 per acre.

From the Bill of Complaint it is impossible to say whether the plaintiffs intended to try to hold Adair, et al, liable as partners of the land company, or as having actively taken part in the sale of the lands through the sales agent Kendall, or as the principals bound by the acts of an agent. The brief for Appellants proceeds upon the last-named ground alone. We wish to mention in passing that the contract between the owners and the company did not create a partnership. The company, as a corporation, could not enter into a partnership, *Salem-Fairfield Tel. Assn. v. McMahan* (Or.) 153 Pac. 788; *Wheeler v. Lack, et al*, 37 Or. 238, 61 Pac. 849; *Hanthorn v. Quinn*, 42 Or. 1, 69 Pac. 817; 18 L. R. A. (NS) note at page 1089; *Corbin v. Holmes*, 83 C. C. A. 367, 154 Fed. 593.

It is proposed by the Appellants Hart to charge these Appellees as undisclosed principals, not of the Harding Land Company with whom Appellees contracted, but of a sub-agent of the Harding Land Company, one Kendall, who made the sale of all the tracts in question. See Transcript of Record pages

72, 80 and 94. Even if it should be held that the contract between the Appellees and the Harding Lang Company created the relation of principal and agent, still the power given the agent, being a delegated power, could not be delegated. "The general rule is that the agent in whom is reposed trust or confidence, or who is required to exercise discretion or judgment, may not entrust the performance of his duties to another without the consent of his principal, and, since nearly all acts of agency involve discretion and the very selection as agent ordinarily implies personal confidence in the agent chosen, it follows that one clothed with authority to act for a principal must ordinarily perform the act himself, and cannot, without the principal's consent delegate it to another." 2 Corpus Juris, page 685, section 342. In this case, as the pleadings and evidence show, Kendall was a total stranger to the Appellees and was not an officer of the Harding Land Company. Appellees not only had no knowledge of the representations which Kendall may have made, but it cannot be presumed that they authorized his employment or the making of any representations by him, even though the Harding Land Company should be held to be an agent. Many authorities are cited in Corpus Juris and it is unnecessary to reprint the list here. We would in addition call attention to the case of Sorenson v. Smith, 65 Or. 78, 129 Pac. 757, in which the decision was in line with the principle

quoted from Corpus Juris. In the Missouri case of Winkelblack v. National Exchange Bank, 155 Mo. App. 1, 136 S. W. 712, it was pointed out that if an agent could appoint another agent without the principal's authority, and he another agent, and the principal should be held liable, for all of them, such agglutination would result in an endless chain of interlopers and necessarily revolutionize all present business methods. If the Harding Land Company was an agent and could delegate its power to Kendall, Kendall could delegate to some one else, and so on without end, and the land owners would have stood in a most precarious position simply because they had made a contract by the terms of which they were to make deeds to the land when they received payment therefor. The complainant and her assignors having dealt with Kendall whom they knew to be an agent of the Harding Land Company and having entered into written contract with the Harding Land Company alone, as though the latter was the owner of the land, and not looking to any person or persons beyond the Harding Land Company, it seems contrary to natural justice to attempt to stretch the law of agency so as to hold the Appellees liable for the alleged representations of Kendall.

Instead of the relationship of principal and agent existing, both the company and the owners

were principals. The owners having the land, the company was at its own expense to survey and plat it and put it on the market. For such purchasers as so desired the company proposed to plant and cultivate fruit trees. The owners were not chargeable with any part of the expense of platting or selling or planting or cultivating. Neither was the company bound to see that the mortgage on the land was paid or a good title furnished. Suppose the company had not paid the surveyor for platting the land, or the nursery company for trees furnished, could the land owners have been held responsible for the company's contracts made in its own name for these things? We think not. It was the same as to sales. The company was selling in its own name.

The owners had given to the company what amounts to an exclusive option on the land for a definite period, with immediate possession. The case is far from being the ordinary one where a real-estate broker negotiates a sale as agent for another and the purchaser knows he is dealing with an agent and looks beyond the latter to the principal.

If it should be considered that the contract between the Appellees and the Harding Land Company created a relationship of principal and agent, still the Harding Land Company had only a restricted power to sell, that is to say, it was bound to realize a certain price for the land owners, deeds to be made

by the land owners only, etc., and it is the law that an agent with restricted power to sell has no power to bind his principal by any representation as to the quality of the land. 2 Corpus Juris, page 616, section 251, and cases cited. In the case of *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180, an agent who had authority to collect, and remit rents, pay taxes, look after ordinary repairs, and in addition had authority to sell, found a purchaser for a building and made certain representations with reference to the condition of the building, which proved to be false. The Trial Court instructed the jury that an agent clothed with authority to sell property, without other limitation than the price, has authority to do all things usual or necessary to carry into effect the power delegated to the agent, and that any representations made by the agent to the purchaser as to the foundation walls of the building would bind the principal as though the principal had made the representations himself. The Supreme Court held these instructions to be erroneous and reversed the case. In the case of *Mayo v. Wahlgreen*, 9 Colorado A. 506, 50 Pac. 40, H. was the owner of 40 acres of land which it was agreed that M. might sell, if he could, provided he realized \$4000.00 for the owner. H. gave M. no authority to make any representations respecting the price, value or situation of the property, and the person who purchased through M.'s efforts had no dealings with H. whatever. The Court

held that M. was not the agent of H. in the sense that he could bind H. by representations as to value.

In the case of *Tucker v. Gibson*, (Kansas), 101 Pac. 633, it was held that one who sold land as owner, the vendee dealing with him as such,—though the naked legal title was in another, was not the agent of the owner.

A case in which the facts were in part like those of the present case is that of *Kern v. Feller*, 70 Or. 140, 140 Pac. 735. In that case a land owner empowered an agent to plat or subdivide his lands in a town site and to sell the town lots therein upon any terms the agent might see fit, provided that no lot be sold for less than \$50.00, and the owner agreed that upon the payment of \$50.00 in cash he would execute title to the purchaser. After the owner had received a certain price for his lands the remaining lands in the tract were to be deeded to the agent. A purchaser of certain lots in the tract rescinded his contract on the ground that the defendant had failed to make and execute a deed for the property. It is pointed out in the opinion in two places that the contract of sale was executed by the agent and the plaintiff and it did not refer to the defendant land owner in any manner, nor did it purport to have been executed by an agent. It also appeared that the purchaser had made payment to the agent, but the court refused to hold the land owner liable for any

of the money paid, because the agent received payment as vendor of the lots and the proceeds received by the agent were spent defraying its expenses. The land owner was held not liable for the exploiting of the town site. It appears to us that this case turned upon the point that although the purchaser had paid for the lands purchased yet he had dealt with the agent as a principal and as the land owner had not received payment for his land, he was not liable for money received by the agent. Of course the breach claimed in that case was failure to make title, and not misrepresentation, but the land owner had stipulated in his contract, that he would execute a good and lawful title to the purchaser of any lot upon payment of \$50.00 in cash. Payment was made to the party with whom he contracted as selling agent. The Court in that case did not go back of the sales contract to look up the liability of an undisclosed principal. We think the same principle applies in this case and as the purchasers here contracted with and relied upon the Harding Land Company alone, and as that company was not a mere agent, but was in fact a principal investing in its own name in the venture, and liable for its own contracts, the land owners ought not to be held in this case as undisclosed principals.

A question analogous to that involved in this case has arisen in a class of cases in which parties

have embarked in joint adventures and afterwards the unsuccessful attempt has been made to hold one of the parties liable for debt created by the other, upon the principle of mutual agency, as in the case of partnership. Examples of such cases are found in *Morback v. Young*, 51 Oregon, 128, 94 Pac. 35; *Klosterman v. Hayes* 17 Oregon 325; *Wheeler v. Lack* 37 Oregon 238, 61 Pac. 849; *Hanthorn v. Quinn* 42 Or. 1, 69 Pac. 817. Where one person owns and operates a saw mill at his own expense, and another person, at his own expense, furnishes the mill with logs to be converted into lumber, each of the parties to have one-half of the lumber, there is no partnership so as to hold one party liable for the debts created by the other. *Hodges v. Rogers*, 115 Georgia, 951, 42 S. E. 251; *Padgett v. Ford*, 117 Ga. 508, 33 S. E. 1002; *Thornton v. George*, 108 Georgia 9, 33 S. E. 633.

The agreement between the Appellees and the Harding Land Company expressly provided that every contract which the Harding Land Company might make for the sale of any of the land should be made in its own name, and this we take it shows an intention not to create the relation of principal and agent.

As shown by the Record, Hart, husband of Mrs. Glenn D. Hart, who is joined with her as plaintiff in this suit, was for a considerable period of time after the purchase of the lots in question a stock-

holder, director, vice-president and sales manager of the Harding Land Company, which company he claims sold the lands in question under fraudulent misrepresentations. In fact Hart became a partner of Kendall, the sub-agent who negotiated these sales. He was selling the same kind of lands for the Harding Land Company and therefore had every opportunity to become informed as to the facts. The evidence shows that at different times while he was thus connected with the company he saw the lots in question, expressly agreed to the substitution of pear trees for peach trees, more than once expressed his satisfaction with the land and with the country, and at the expiration of the three year period of cultivation provided in the Harding Land Company's contract he took over the two lots of himself and wife to be cared for by himself. He first saw the lots in January, 1911, again in February, 1912, and again in July, 1912. He became sales agent of the Harding Land Company in March, 1911. See Transcript of Record, pages 82 and 83. In April, 1912, he remitted to the Harding Land Company \$400.00 to apply on the purchase price, and this he admits was after his second visit to the land. See Transcript of Record page 85. The lots were sold in the spring of 1910, while this suit was filed on March 9th, 1914. Hart acted for himself and for his wife and practically also for Mrs. Peterson, the remaining assignor of plaintiff, who was an old friend of the Harts. In

the case of *Grymes v. Sanders*, 93 U. S. 62, 23 L. ed. 798, at page 802, of 23 L. ed. Mr. Justice Swayne says: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once indicate his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose."

It is true that Mrs. Peterson did not have the same opportunity as the Harts to know the facts. Yet the Record shows that full settlement was made with her as to the matter of peach trees, and she had no other ground of complaint whatever, her claims that there were stones on the land being proven false. She denies that she made the subsequent contract with reference to the replacing of the peach trees with pear trees, but the weight of the testimony is against her. Against her is the writing given her by the Harding Land Company which was produced in Court, and also the testimony of the witness Hinkley. When she made the arrangement as to the substitution of pear trees for peach trees she affirmed the contract as thus modified. Furthermore with reference to the matter of the growing of peaches on the

tract, the most that is claimed for complainant is that the sub-agent of the Harding Land Company represented that the land would produce peaches profitably. There was no representation that the land ever had produced peaches. Honest men might differ upon a subject of this kind, and affirmations as to what a land will produce as distinguished from representations as to what it has produced in the past, furnish no ground of presuming any fraudulent intent. See 39 Cyc. 1274; *Gordon v. Parmelee*, 2 Allen 212. However, even the representation as to peaches was corrected with the consent of all parties by the agreements to substitute pear trees and by the actual substitution of the pear trees on the two Hart lots. The reason the substitution did not actually take place on Mrs. Peterson's lot was that the suit was begun before the proper season for planting the pear trees had arrived.

As bearing further upon the question of laches and delay we call attention to the evidence in the Record which shows that when these contracts of sale were made there was great demand for fruit lands in the locality in question and prices were high. Four years afterwards when the suit was filed the boom had collapsed. The testimony on this subject comes from different witnesses and is undisputed. See for example the testimony of witness St. John, beginning at the bottom of page 156 of the

Transcript of Record. An instructive case is the Oregon case of Potter Realty Company v. Breitling, 155 Pac. 179, decided February 15, 1916. In that case there had been a sale of property during boom times and after the tide of speculation had receded the purchaser sought to repudiate the contract of purchase on the ground of fraudulent representations. In that case the delay after knowledge or opportunity to have knowledge was much less than in this case. At page 183 of the report the Court, in the opinion, points out that one who claims that he has been induced to enter into a contract by deceit cannot retain the advantages of the agreement in order to determine whether or not a disaffirmance is the more profitable course to pursue, for rescission demands prompt action on the part of the defrauded party, and any unreasonable delay in asserting a disaffirmance of the contract will be considered as an election to treat it as continuing, and any right of action will be limited to a recovery of the damages which he has suffered. In that case the defendant testified that having heard rumors to the effect that the statements made to him at the time of the sale were false he ceased making further payments, but did not visit and inspect the lots until more than six months thereafter, when he found that such representations were untrue. The Court said that he resided within a day's journey of the property and he was chargeable with laches in not

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sooner ascertaining and asserting his rights.

The foregoing considerations would, in the judgment of the Appellees require a decision in their favor, even if there had been any fraudulent representations made by the sub-agent of the Harding Land Company in the sale of the lands in question, and those representations had not been waived by the acts of the purchasers. The Appellees respectfully insist, however, that, as fully shown by the brief filed in this case upon behalf of the Appellant W. C. Harding Land Company, there was no fraudulent misrepresentation, though there was an innocent misrepresentation as to the adaptability of the land to the growing of peaches, but that was waived by the subsequent conduct of the purchasers, the agreements that pear trees might be substituted for the peach trees, and by other acts after the purchasers knew of the facts. We deem it unnecessary to repeat the analysis of the testimony contained in the brief of the Appellant W. C. Harding Land Company, as it would simply increase the labors of the Court. Appellees take the position that that brief shows that the plaintiffs have under the evidence no cause of suit against the W. C. Harding Land Company, and in that event of course there can be no claim against the Appellees.

Appellees further insist that not only does it clearly appear from the Record that there was no

fraudulent representation in connection with the sale of any of the lots in question; not only is the land in fact of a deep fertile character well adapted to orchard purposes; not only did each of the purchasers after full knowledge of the land, ratify his contract, with modifications as to peach trees, and accept his respective tract and thus fully affirm the contract, but a further and conclusive reason why this suit cannot be maintained as to the tracts sold to Glenn D. Hart and Ella Peterson is that prior to the commencement of the suit Ella Peterson and Glenn D. Hart assigned their contracts to the Appellant Mrs. Glenn D. Hart. These assignments amounted either to affirmations of the contracts or attempts to assign and transfer mere litigious rights. The affirmations of the contracts in this manner prevents the maintenance of suit for rescission. *Cooper v. Hillsboro Garden Tracts*, (Or.) 152 Pac. 488.

This case is on all fours with the case last mentioned, as regards the matter of affirmation of the contracts by assignment of the same prior to filing suit. As *Cooper v. Hillsboro Garden Tracts* is an Oregon case we ask especial attention to the decision of the Court and to that portion of the opinion which begins at page 152 Pac. 492, showing that there cannot in this case be any rescission so far as concerns the contracts of sale made to Ella Peterson and

Glenn D. Hart, because they have both assigned to the plaintiff Mrs. Glenn D. Hart. As the Record shows both of these assignments were made after the parties knew the land, and Hart's assignment was made more than two years before suit was filed, after he had made two visits to the land, and in the notice given to the trustee of the assignment he promises further remittances in a short time. See the Transcript of Record, page 88. As to the contract of Mrs. Hart herself there should be no rescission because of ratification and affirmance as elsewhere discussed in this brief, and in the brief of the Harding Land Company. It should be remembered that in all the transactions with reference to the land Glenn D. Hart acted as agent of his wife. She so states in her testimony, Transcript of Record, page 80.

The learned District Court refused to hold the Appellees liable in this suit, and we believe its decision in that respect was based upon the soundest principles of equity. Counsel for the Appellants Hart has not been able to suggest a single reason why his clients should be permitted to attach liability to persons with whom they made no contract, who made no representation, and of whom in fact they had never heard, until after they had ceased to make payments under their contracts. If it were in accordance with equity that those standing in the position of the Appellees should be held liable, the

question naturally arises as to the extent of their liability. This suit is brought for rescission of contract and to obtain repayment of the money paid by the purchasers of the land. Is it not then necessary as part of the case of complainants that they should trace the payments into the hands of the Appellees and show what proportions of the purchase price they actually received? Complainants have not sought to do this, but have based their suit upon the theory not only that the Appellees are liable, but that they are liable for every dollar paid to the W. C. Harding Land Company, together with interest thereon. They have apparently proceeded on the theory that their recovery against the Appellees could be as broad as though they had brought an action for damages instead of a suit for rescission. We take it that a suit for rescission is brought for the purpose of restoring the parties to their former condition. If the theory of the Appellants Hart is correct they can by suit for rescission accomplish the same thing as by an action for damages. This case shows no attempt whatever to trace any of the money paid by the purchasers into the hands of the Appellees. It seem to us, therefore, that on this point alone, a Court of equity will not, in a suit for rescission, hold the Appellees liable. In this connection, we can do no better than to ask attention to the case of *Daniel v. Mitchell*, Fed. Cases, No. 3562, 1 Story 172, cited by the Appellants Hart. The emin-

ent Mr. Justice Story applied there the equitable principle for which we are now contending. The suit was one for rescission of contract. The Bill called upon the defendants interested in the land sold, but who took no part in the negotiations for sale, to set forth their respective interests at the time of sale, and what portion of the consideration each received, and how the distribution was made among them. And the decree of rescission entered provided as follows: "And it is further ordered, adjudged and decreed by the court that the said James Todd (who received the purchase money) be, and hereby is held directly liable to the plaintiff for the whole amount of moneys paid as aforesaid, deducting, however, therefrom the proceeds of timber sold, as well as the value of the timber taken from said lands by and under the authority of the said Otis Daniel, (purchaser) and remaining unsold, and making all due allowances for all proper charges and expenses incurred in regard to said timber, and for taxes paid on said lands. And it is further ordered, adjudged and decree that such of the other parties, defendants to said bill, as **with a full knowledge of the premises**, or for whom the said Todd acted as agent, or who assented to the said contract of sale and conveyance, with a full knowledge of the premises, shall be, and hereby are decreed to be liable in aid and relief of the said Todd, to pay and deliver back to the said Otis Daniel such parts or

portions of the purchase money paid by the said Daniel for the said lands, as have been received by them respectively in the premises, or on the notes of the said Daniel so received by them, but no one of them to be liable for any purchase money or notes received by any of the other parties, defendants.”

The case of *Mason v. Crosby*, 1 Woodb. & M. 342, Fed. Cases, No. 9234, also cited in the brief for Appellants Hart, is an authority very much in point. In that case the court refused to hold the land owners liable for any purchase money or notes delivered to the selling agent, who procured the sale through false representations, although the agent had become insolvent and had died. See discussion at page 1024 of 16 Fed. Cases.

If the Court in this case were to attempt to hold the Appellees liable it would have no guide as to the extent of that liability, except as shown by that part of their Answer which appears on page 19 of the Transcript of Record on Appeal.

As to the claim made on behalf of the Appellants Hart that the Appellees ratified the alleged acts of the Harding Land Company, we call attention to the fact that it is nowhere claimed in the evidence that the Appellees ever authorized or had any knowledge of any representations made in connection with the sale of the lots. There could be no

ratification without knowledge on the part of Appellees of what had taken place, and it was necessary that Appellees should know all the material facts and circumstances relative to the transaction. 2 Corpus Juris, page 476, section 93; O'Shea v. Rice (Neb.) 69 N. W. 308, 310; Murphy v. Clarkson (Wash.) 66 Pac. 51.

A further reason why the Appellants Hart cannot recover in this case against these Appellees is found in the fact that the contracts of sale under which the Appellants are claiming, were contracts in writing and under seal. As already pointed out these contracts did not contain the names of the Appellees, but were made by the W. C. Harding Land Company on the one part and the respective purchasers on the other part. See plaintiffs exhibits "E," "F" and "G," Transcript of Record on appeal, pages 67 to 71, inclusive. Appellants Hart are seeking to hold the Appellees liable as undisclosed principals, but the law is well settled that an undisclosed principal cannot be held liable upon a contract under seal executed by an agent in his own name. 2 Corpus Juris, 843, Section 524; 2 Mechem on Agency, 2nd ed., Section 1734. Both of these works cite many decided cases from different jurisdictions, as authority for this proposition. The same rule is recognized in Barbre v. Goodale, 28 Or. 465. See also Willard v. Wood, 135 U. S., 309, 313, 34 L. ed., 210, at 213; Badger Silver Mining Co., v.

Drake (Circuit Court of Appeals, 5th Circuit) 88 Fed. 48, 31 C. C. A. 378. Mr. Meheem, in the section cited, says that the mere fact that the principal received the benefit of the contract does not, it is held, alter this rule. Seals are not abolished in Oregon.

Appellees believe that the rule quoted in the brief for Appellants Hart, point No. 11, page 18, reading as follows: "It is a firmly established rule of law that a principal is liable upon a written **simple** contract entered into by an agent in his own name within his authority," etc., is correct, but counsel seems not to have noticed the importance of the adjective "simple" in this statement. The authorities which he cites upon this proposition throughout his brief are found upon examination to be cases involving **simple** contracts and not specialties or contracts under seal.

In the case of Denike v. De Graaf (N. Y.) 87 Hun. 61, the action was to recover damages for deceit in a contract for the exchange of lands. The plaintiff claimed that one who had made a contract under seal for exchange of lands acted for plaintiff, and sought recovery for false representations of defendant. But the agreement was in the name of the alleged agent, and plaintiff was not mentioned. The Court points out that plaintiff could have maintained no action on the contract, citing Briggs v.

Partridge, 64 N. Y. 357, because as to agreements under seal it is not permitted to show that any of the parties acted as agent for a principal not named in the instrument. It was claimed that the rule applied only where the action was brought directly on the instrument, while here plaintiff was suing for fraud in inducing him to enter into the contract. The Court points out that plaintiff was in nowise bound in the contract or liable for its non-performance, and concludes that as the alleged agent was the only party who could have enforced the contract he was the only person who could disaffirm it. The complaint was dismissed.

In the case of *Klein v. Mechanic & Traders Bank* 145 N. Y. App. Div. 615 at page 617, the lower court had held that one not a party to a contract under seal may proceed against one who has had the benefit of the contract. The opinion on appeal reads, in part, as follows: "This holding is based upon a few lines found in the leading case of *Briggs v. Partridge*, (64 N. Y. 357) where the learned jurist writing the opinion says 'We find no authority for the proposition that a contract under seal may be turned into the simple contract of a person not in any way appearing on its face to be a party to or interested in it, on proof *dehors* the instrument, that the nominal party was acting as the agent of another, and especially in the absence of any proof that the

alleged principal has received any benefit from it or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal so as to embrace this case.' None of the authorities since that time, so far as we are able to discover, has ever thought that this reference to 'the absence of any proof that the alleged principal has received any benefit,' etc. was intended to modify the general rule. On the contrary the rule has been consistently maintained that, where the instrument is under seal, no person can sue or be sued to enforce the covenants therein contained, except those who are named as parties to the instrument and who signed and sealed it."

*Byington v. Simpson*, 134 Mass. 169, relied on by Appellant, was a case of a simple contract, not one under seal, and the opinion shows that the court recognized that fact and states the rule which it enforced as if applying only to simple contracts. Furthermore all parties to the contract understood the agency and who the principals were and the agent signed as "agent".

In the case of *Alger v. Keith* (cited by Appellants Hart as *Alger v. Anderson*) 105 Fed. 105, when the contract of sale was made, Anderson, the owner of the land, received directly notes for part of the purchase price in his own name, and at the time

executed his deed, he was therefore not an undisclosed principal. See the opinion at page 110. He himself also made false representations as to the land. See opinion page 113. He was therefore an active participant in the fraud, so that this case is not an authority in support of the contentions of Appellants Hart. Furthermore in this case it appeared that one Gonce, an innocent party, who received part of the price was held not liable upon rescission. See the opinion, 105 Fed. at 120.

### **As to Jurisdiction.**

It appearing that Plaintiff cannot recover upon the assigned contracts, the amount involved is reduced to less than two thousand dollars and the Bill should be dismissed for lack of jurisdiction, there being no federal question in the case.

*Farmington v. Pillsbury*, 114 U. S. 143 29 L. ed. 114.

The Court should dismiss the suit of its own motion. The Supreme Court of the United States said in *Morris v. Gilmer*, 129 U. S. 315, 326, 32 L. ed. 690:

“But if the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit; and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will

correct, when the case is brought here for review. The rule is inflexible and without exception, as was said, upon full consideration, in *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382 (28:462, 463) ‘which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other Courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for himself, even when not otherwise suggested, and without respect to the relations of the parties to it.’ To the same effect are *King Bridge Co. vs. Otoe Co.* 120 U. S. 225 (30:623); *Grace v. Am. Cent. Ins. Co.* 109 U. S. 278, 283 (27:932, 934); *Blacklock v. Small*, 127 U. S. 96, 105 (ante. 70) and other cases.”

See also the later cases. *Minnesota v. Northern Securities Co.* 194 U. S. 48, 62; 48 L. ed. 870; *Steigleder v. McQuesten* 198 U. S. 141, 142, 49 L. ed. 986.

## CONCLUSION.

We believe it appears from the Record that the land in question is substantially of the character and quality represented by the sub-agent Kendall, that the statements of Kendall and those contained in the literature of the Harding Land Company as to the adaptability of the land to the growing of peach trees as temporary "fillers" was innocently made, and was corrected afterwards by agreement of all parties concerned; that the land is thoroughly adapted to the growing of apple orchards, which was the chief purpose for which it was sold; that the purchasers after seeing the lands ratified and affirmed the contracts and their efforts to rescind after the boom had collapsed is not made in good faith; that the Appellees Adair, et al, should not be held to have made the Harding Land Company their agent, but even if the Court should be of contrary opinion the facts do not justify a decree against either the Land Company or the Appellees; that even if the Harding Land Company became the agent of Appellees the latter should not be bound by the alleged representations of a sub-agent whose appointment they did not authorize; that even the Harding Land Company as agent of Appellees would have no authority, under its restricted power to sell, to make representations as to the quality of the land; that on

the ground of laches alone the bill ought to be dismissed; that the learned District Court rightly refused to hold the Appellees Adair, et al, liable whatever may be said of the justice of its decree against the Harding Land Company; that Appellants Hart seek to charge the Appellees for the full amount of money paid to the Harding Land Company, without showing that the same ever came into the hands of the Appellees, and said relief is not equitable in a suit for rescission of contract; that the Appellees cannot be charged with ratification of the alleged acts of the Harding Land Company and its sub-agent, because it does not appear that they ever had knowledge, prior to the filing of the suit, of the alleged representations; that because of the assignment of the contracts issued to Mrs. Peterson and Glenn D. Hart prior to the filing of suit, these contracts were affirmed, and rescission will not be granted after affirmance and the court is without jurisdiction; that in any event the Appellees Adair, et al, cannot be held liable with reference to the contracts of sale upon any suit either in affirmance or disaffirmance of the same, for the reason that said contracts are under seal and Appellees are not parties to the same or mentioned therein, and the rule as to holding an undisclosed principal does not apply to contracts under seal.

For the foregoing reasons and because of the manifest lack of equity in the suit, which appears from the whole Record, we submit that the action of the lower Court in refusing to hold Appellees liable ought to be affirmed.

Respectfully submitted,

B. L. EDDY,  
Solicitor for Appellees Adair, et al.

Solicitor for .....

Solicitor for .....

IN THE  
**UNITED STATES CIRCUIT  
 COURT OF APPEALS**  
 FOR  
**THE NINTH CIRCUIT**

Mrs. Glenn D. Hart and Glenn D. Hart,  
 Appellants,

vs.

Walter Adair, J. T. Epperly, James P.  
 Burns, F. S. Green and L. B. Wal-  
 lace,  
 Appellees,

AND

W. C. Harding Land Company, a cor-  
 poration,  
 Appellant.

vs.

Mrs. Glenn D. Hart and Glenn D. Hart,  
 Appellees.

**REPLY BRIEF OF APPELLANT W. C. HARD-  
 ING LAND COMPANY.**

On Appeal from the District Court of the United  
 States for the District of Oregon.

O. P. COSHOW,

Attorney and Solicitor for W. C. Harding Land  
 Company.





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IN THE  
UNITED STATES CIRCUIT  
COURT OF APPEALS  
FOR  
THE NINTH CIRCUIT

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Mrs. Glenn D. Hart and Glenn D. Hart,  
Appellants,

vs.

Walter Adair, J. T. Epperly, James P.  
Burns, F. S. Green and L. B. Wal-  
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W. C. Harding Land Company, a cor-  
poration,  
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Mrs. Glenn D. Hart and Glenn D. Hart,  
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REPLY BRIEF OF APPELLANT W. C. HARD-  
ING LAND COMPANY.

---

On Appeal from the District Court of the United  
States for the District of Oregon.

---

O. P. COSHOW,

Attorney and Solicitor for W. C. Harding Land  
Company.

## REPLY BRIEF.

The brief of the Appellees Hart discusses only the alleged failure of the Appellant W. C. Harding Land Company to make proper assignments of error, and appears to rest the case of Appellees upon said objection, without discussing the merits.

We do not think it necessary to discuss in detail the several authorities cited in said brief, but would call attention to the fact that the decree appealed from was framed in accordance with Equity Rule 71, which prohibits the reciting or stating in the decree of any prior proceeding and thus does away with the recitals and declaratory part of the old forms of decrees. There were no findings of fact, no recital of facts, and nothing appearing in the decision of the lower Court which would indicate its view of the different questions entering into the case as shown by the pleadings and evidence. Under these circumstances it would appear quite difficult to frame assignments of error which would not be vulnerable to the objections raised by counsel for the Appellees Hart. By way of illustration attention might be called to the assignments of error on behalf of said Appellees in their own appeal in this case against the Appellees Adair, et al. See Transcript of Record, pages 232-3. These assignments

are subject to the same objection as to their generality that is now made against the assignments of this Appellant. The fact is, however, that owing to the nature of the decision of the lower Court it would be difficult to make the assignments more specific without involving in them an analysis of the the pleadings and evidence such as is properly set forth in the briefs.

Many of the cases cited by Appellees Hart in support of their objection to the assignments of error were actions in which there were findings of fact made in the trial Court. In other cases the defect in the assignments of error was attacked by motion to strike the same from the Transcript of Record, whereas in this case no objection has been made until the cause is before the Appellate Court on the merits. Many of the cases cited were actions at law, in which there was ample opportunity to specify the alleged errors of the Court, because the proceedings were so conducted that those errors could be pointed out. This creates a different situation from that in the present case, where we have nothing but the general conclusion of the Court. We would further call attention to the fact that in many of the cases cited in said brief, although the reviewing Court criticised the assignments of error, still it examined the entire Record before reaching a conclusion.

It is true that the answer of Appellees Adair, et al, expressly pleaded ratification and affirmance of the sales contracts. Much testimony on this question also was introduced. The answer of this Appellant expressly pleaded the offer made by Appellant to substitute pear trees for peach trees, after the failure of the latter had been ascertained. However, we take it that an express ratification on behalf of the purchasers was not necessary, but if it appears from their conduct that they at any time ratified the contracts there could be no recovery by them, even though ratification might not be pleaded as an affirmative defense. If it appeared as a defect in the case made by the plaintiff there could be no recovery.

“When a party, with knowledge of facts entitling him to rescission of a contract or conveyance, afterwards, without fraud or duress, ratifies the same, he has no claim to the relief of cancellation. An express ratification is not required in order thus to defeat his remedy; any acts of recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it, have the effect of an election to affirm. ‘This doctrine seems to rest not upon the principle of a new contract between the parties, nor yet upon the ordinary principle of estoppel in pais, but rather upon a distinct principle of public policy, that all that justice or equity requires

for the relief of a party having such cause to impeach a contract is that he should have but one fair opportunity, after full knowledge of the rights, to decide whether he will affirm and take the benefits of the contract or disaffirm it and demand the consequent redress. Any other rule would be regarded as unjust, even toward the party guilty of the wrong out of which grows the right to rescind'."

6 Cyc. 297-8.

It is claimed that this Appellant cannot now rely upon the assignments of the contracts to the complainant, as affirmations thereof, or as constituting merely attempts to transfer litigious rights, for the alleged reason that no such defense was interposed in the Court below. In answer to this it is only necessary to call attention to the fact that the assignment of the contracts was pleaded by complainant and was proven by her on the trial. It was therefore not necessary or proper that this Appellant should plead the same, and if the assignments have the legal effect claimed by this Appellant, then the matter arises upon the consideration of the Bill of Complaint itself, and the question is one that stands at the very threshold of this case. Therefore this Appellant is not seeking to inject this question into the Record, as claimed. Appellees Hart in objection to the assignments of error as made by this Appellant rely upon rule 11 of this

Court, but that rule itself provides that the Court may, at its option, notice a plain error not assigned. It would be difficult to point out an error that could be plainer than to permit plaintiff to recover, in a suit for rescission, as assignee of other persons, where the assignments themselves are set out in the Bill, and either amount to affirmations of the contracts, and thus preclude rescission, or else amount to mere void attempts to assign litigious rights.

“The Court of review will, without mention of the same, in an assignment of errors, consider \* \* \* an error that lies at the threshold of the case and shows that the plaintiff below had no cause of action.” 3 Foster, Fed. Prac. 4th ed. p. 2081, sec. 508 a., citing *A. Santaella & Co. v. Otto F. Lange Co.* (C. C. A.) 155 Fed. 719, and *U. S. v. Bernays* (C. C. A.) 158 Fed. 792.

In the brief under discussion counsel expends considerable effort to show that the defense of estoppel must be pleaded. We do not take issue with him in that particular.

We are not conscious of having claimed anything to the contrary in our former brief. We have not asserted that plaintiff is estopped to seek a rescission of the assigned contracts. On the contrary we claim that the assignments of the contracts produced a certain legal effect in substance. Estop-

pel relates to matters of proof. The Bill of Complaint shows the assignments, and the point we raise has nothing to do with proof. We have desired that plaintiff might be heard, and she has been heard, and by the pleadings and proof offered by herself it conclusively appears that she has no cause of suit upon the two assigned claims. Surely one who pleads and proves sufficient to bar himself from any right of recovery is not suffering in any way from the application of the principle of estoppel. The point we raise in this connection was before the lower Court and is before this Court, because of the allegations of the Bill of Complaint itself. It cannot be said that a question which appears on the face of the Bill itself is "imported," into the case by the defendants.

We quote as follows from *Santaella & Co. v. Otto F. Lange Co.*, decided by the Circuit Court of Appeals of the 8th Circuit, 155 Fed. 719 at 724:

"That counsel does not fully recognize and urge a principle of law in argument which is embraced within the pleadings or presented in the Record cannot preclude the Court from giving due consideration and application to a rule of law which is determinative of the controversy. Indeed, an appellate Court would fail to heed the wholesome maxim, '*Interest reipublicae ut sit finis litium*,' should it fail to take notice, when reasonably pre-

sented, of a settled principle of law the application of which ends the litigation. Rule 11 of this Court (150 Fed. XXVII) respecting the assignment of errors, declares that 'the court, at its option, may notice plain errors not assigned.' This proviso was and is intended, in the interest of justice, to reserve to the appellate court the right, resting in public duty to take cognizance of palpable error on the face of the record and proceedings, especially such as clearly demonstrate that the suitor has no cause of action."

### **As to Jurisdiction.**

It appearing that Plaintiff cannot recover upon the assigned contracts, the amount involved is reduced to less than two thousand dollars and the Bill should be dismissed for lack of jurisdiction, there being no federal question in the case.

Farmington v. Pillsbury, 114 U. S. 143, 29 L. ed. 114.

The Court should dismiss the suit of its own motion. The Supreme Court of the United States said in *Morris v. Gilmer*, 129 U. S. 315, 326, 32 L. ed. 690:

"But if the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit; and its failure or refusal to do what, under the law

applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct, when the case is brought here for review. The rule is inflexible and without exception, as was said, upon full consideration, in *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382 (28:462, 463) 'which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other Courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for himself, even when not otherwise suggested, and without respect to the relations of the parties to it.' To the same effect are *King Bridge Co. vs. Otoe Co.* 120 U. S. 225 (30:623); *Grace v. Am. Cent. Ins. Co.* 109 U. S. 278, 283 (27:932, 934); *Blacklock v. Small*, 127 U. S. 96, 105 (ante. 70) and other cases."

See also the later cases. *Minnesota v. Northern Securities Co.* 194 U. S. 48, 62; 48 L. ed. 870; *Steigleder v. McQuesten* 198 U. S. 141, 142, 49 L. ed. 986.

Respectfully submitted,

O. P. COSHOW,  
Attorney and Solicitor for Appellant W. C. Harding  
Land Co.

Solicitor for .....

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COUNTY OF

} ss.

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IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MRS. GLENN D. HART and  
GLENN D. HART,

*Appellants,*

vs.

WALTER ADAIR, J. T. EPPERLY, JAMES  
P. BURNS, F. S. GREEN and L. B.  
WALLACE,

*Appellees,*

vs.

W. C. HARDING LAND COMPANY, a cor-  
poration,

*Appellant,*

vs.

MRS. GLENN D. HART and  
GLENN D. HART,

*Appellees.*

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Reply Brief of Appellants Hart

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On Appeal from the District Court of the United  
States for the District of Oregon.

E. A. LUNDBURG,  
Solicitor for Appellants Hart.



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IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MRS. GLENN D. HART and  
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*Appellants,*

vs.

WALTER ADAIR, J. T. EPPERLY, JAMES  
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GLENN D. HART,

*Appellees.*

On Appeal from the District Court of the United  
States for the District of Oregon.

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Reply Brief of Appellants Hart

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Counsel for appellees Adair, et al, asserts in his brief that 100 acres of the land, which was hill land, was without value; this statement is not true. In appellees' agreement for the sale of the lands it

is provided that the Land Company shall sell the hill lands at a price to average \$15.00 per acre and that Lot 32, containing 2.61 acres, on which is situated a house and barn, shall be sold for at least \$1,000.00. (See page 60 Record, par. 3.) The court's attention has already been directed to the fact that the appellant Harding Land Company has brought no question to this court by any assignment of error for review, and that the only questions properly brought to this court for review are those raised by appellant Hart's assignments of error. It is manifestly improper for the appellees Adair, et al, therefore, to discuss in their brief any question other than those raised by appellant Hart's assignments of error. It is therefore the contention of the appellants Hart that rescission of the contracts in controversy having been granted by the trial court upon the issues presented by the pleadings and consideration of the evidence of witnesses before him and resulting in substantial conflict with respect to material issues should not be set aside on appeal, and further that this court cannot reconsider such conflicting evidence upon any question before the lower court not brought to this court for review by any valid assignment of error, which fact has been clearly demonstrated to this court in the brief of the appellees Hart.

There is only one question before this court for review and that is the responsibility of the land owners, appellees Adair, et al, for the return of the money paid under each of the contracts rescinded for the fraud of their sales agent, the Harding Land Company, and this is to be determined by the construction placed upon the agreement for the sale of

the land between the owners and the Land Company, to which the court's attention has already been called. Counsel Eddy in his argument to the court gave much of his time to a discussion of Mr. Hart's connection with the Land Company as a stockholder and officer subsequent to the time he and his wife purchased tracts, all of which facts were considered by the lower court in reaching its decision, and are not open to review on any question brought to this court on appeal.

The only fortunate feature of Mr. Hart's connection with the Land Company was his inability to pay the notes he gave for stock in the Land Company and was thereby saved from being swindled out of \$5,000.00.

Several questions have been set out and discussed in appellees' brief, which are mere repetition of similar propositions advanced in the reply brief of the Land Company. We will briefly note the same and discuss their application to the questions before the court in the order in which they appear in appellees' brief.

## **POINTS OF LAW AND AUTHORITIES.**

### **I.**

Ratification is a matter to be pleaded as a defense and established by proof, that it need not be negatived by the bill, but to be available is a matter of defense which must be pleaded. Where it does not affirmatively appear from the allegations of the bill that the complainant has been guilty of laches, nor that it has done anything to condone the frauds complained of or to ratify the contract alleged to be fraudulent, any such fact must be

pleaded and established by proof.

Northern Pacific R. R. Co. v. Kindred, 14 Fed. 77.

State v. Ruff, 6 Ind. A. 38, 33 N. E. 124.

## II.

When the owners authorized the Land Company to make contracts of sale in its own name for the sale of their land, they knew in conferring such power that the corporation could not act personally, but that in performing the engagement it would act through its agents, who for that purpose are its faculties, and whose acts are the acts of the corporation, and that the relation between it and its instrumentalities are as one being, or artificial person, and involves no delegation of power.

Killingsworth v. Portland Trust Co., 18 Ore. 351, 23 Pac. 66, 7 L. R. A. 638.

## III.

Where an agent is employed to sell certain land, the principal is responsible for his false representations as to the land, although the agent is not authorized to make them, and although the principal has no knowledge of them until after the sale is completed.

2 Corpus Juris, Sec. 541, Pages 855-6.

Wolfe v. Pugh, 101 Ind. 293.

Haskell v. Starbird, 152 Mass. 177.

## IV.

It was alleged and proved that the owners accepted the contracts in controversy including "planting and cultivating agreement," and they

therefore ratified the contracts and became bound thereby.

2 Corpus Juris, Sec. 640, Page 917.

2 Corpus Juris, Sec. 99, Page 481.

## V.

The owners of the land having selected the land for the sole and single purpose of its "exploitation and sale as orchard land," and having intrusted it for such purpose to the Land Company with authority to sell and make contracts of sale in its own name "**as orchard land**," must be held to make full restitution for the fraud thus committed within the scope of the agent's authority.

2 Corpus Juris, Sec. 534, Page 849.

2 Corpus Juris, Note (a), Page 850.

McIntire v. Pryor, 173 U. S. 38, 19 S. Ct. 352.

Alger v. Keith, 105 Fed. 105.

Alger v. Anderson, 78 Fed. 729.

## VI.

Under the assignments of two of the contracts in controversy the appellants acquired all of the rights of their assignors therein, and the assignment carries with it the right to employ any remedy which is open to the assignor.

Dahms v. Sears, 13 Ore. 47, 11 Pac. 891.

Sperry v. Stennick, 64 Ore. 96; 129 Pac. 130.

Secs. 378 and 379, Title V, Chap. VI, Lord's Oregon Laws.

Sec. 484, Title VI, Chap. VII, Lord's Oregon Laws.

Barker v. Ladd, Fed. Cases 990, 3 Saw. 44.

Com. S. S. Co. v. Am. Ship. Bldg. Co., 197 Fed. 780 at 795.

## VII.

Under the Oregon law a seal affixed to writing is primary evidence of a consideration. In other respects there is no difference between sealed and unsealed writings, except as to the time of commencing suits or actions thereon.

Sec. 776, Title 9, Chap. 7, Lord's Oregon Laws.

Olston v. Oregon Water Power Co., 52 Ore. 357 at 358.

Streeter v. Janu (Minn.), 96 N. W. 1128.

Montgomery v. Dresher (Nebr.), 134 N. W. 251.

## VIII.

In the federal courts the jurisdictional amount in controversy is the aggregate amount prayed for.

Chase v. Roller Mills Co., 56 Fed. 625.

Bowden v. Burnham, 56 Fed. 752.

Heffner v. Gwynne T. C. Co., 160 Fed. 635.

**ARGUMENT.**

## I.

Counsel for appellees has gone to much trouble to state the law and cite cases in support thereof under Points and Authorities on pages 3, 4 and 5 of his brief on the question of ratification, waiver, laches, all of which we submit have no application to any question before this court for review under an assignment of error.

Appellees are not in this court upon any assignment of error other than those of the appellants Hart, and the lower court upon consideration of the facts presented under the issues formed by the

pleadings determined that there had been no ratification of the contracts as alleged in the answers of either the Land Company or the appellees.

Further than this neither the Land Company nor the appellees pleaded any defense of laches or waiver in the lower court, and under any circumstance any such fact must be pleaded and established by proof to be available.

Northern Pac. R. R. Co. v. Kindred, 14 Fed. 77.

## II.

Appellees contend that because the contracts in controversy were secured by the sales manager or agent of the Land Company that the power to make such a sale cannot be delegated without the authority of the land owners. In the case of Killingsworth v. Portland Trust Co., of Oregon, 18 Ore. 35, Lord Justice held, "When a corporation is made the agent to sell and convey property, it acts through the same instrumentalities as when acting for itself, and the relation between it and its instrumentalities are as one being or artificial person and involves no delegation of power \* \* \* so that a person conferring upon a corporation such power knows that the corporation cannot act personally in the matter, but that in performing the engagement it will act through its agents, who for that purpose are its faculties, and whose acts in the discharge of that duty are the acts of the corporation, and as such must be considered to be included in the artificial person, as instrumentalities authorized by him to do the act conferred by his power of attorney."

## III.

The Land Company was not restricted in its power to make a sale, the appellees not alone authorized the Land Company to sell the particular land but to "exploit and sell" it as orchard land, and to enter into contracts of sale in "its own name" with purchasers, and the statement of law which counsel cites from 2 C. J. Sec. 251, page 616, and cases cited therewith in his brief, clearly have no application. The case of *Samson v. Beale*, 27 Wash. 557, one of the cases cited, is a case where the agent having authority to collect rents and remit same and look after repairs of property also was authorized to find a purchaser but could not make a sale without first submitting offer to owners, thus his power to sell was restricted, and the owners were not liable for his representations. The case of *Mays v. Wahlgreen*, 9 Colo. A. 506, was not a case of agency at all. The true rule to be applied to the case at bar is found in 2 C. J. Sec. 541, pages 655-6, to-wit: "Where an agent in negotiating a transaction or making a contract on behalf of his principal makes representations, declarations and admissions, in connection therewith respecting the subject matter, they will be binding on the principal where they are false and fraudulent, made without the principal's knowledge, and constitute a breach of trust against the principal." Also the case of *Wolf v. Pugh*, 101 Ind. 293, it was held, "Where an agent is employed to sell certain land, the principal is responsible for his false representations as to the land, although the agent is not authorized to make them, and although the principal has no knowledge of them until after the sale is completed." To like effect is the case of *Haskell v.*

Starbird, 152 Mass 117, 25 N. E. 14.

#### IV.

All of the facts showing the relation between the appellees and the Land Company, including the contract made with the Land Company by the owners were fully pleaded in the bill of complaint, and while under the original contract for the "exploitation and sale of the tracts as orchard land" it was the evident purpose "to plant and care for the tracts where the purchasers desired," yet when the owners under the supplemental contract accepted the sale contracts including the "planting and cultivation agreement" they thereby ratified the contracts so made and became bound thereby. These facts have already been called to the attention of the court in our former brief and Counsel Eddy in his brief and upon his oral argument to the court seeks to avoid the consequences of this fact, by contending "that appellees cannot be charged as having ratified the contracts in question because it appears that they had no knowledge of the alleged representations prior to the filing of suit." (See par. X, page 7, of Appellees' Brief.)

That the ratification was sufficiently pleaded and proven, see 2 C. J. Sec. 640, page 917, which says, "Proof of ratification includes proof of agency and authority, and although it has been held that ratification must be pleaded in order to be shown, it may be shown under a complaint charging the ratified act to be the act of the principal, or under an averment in the pleading that the agent acted by due authority."

Granting for the sake of argument that the Land Company was not in the first instance authorized to include the "planting and cultivation agreement," yet all the other features of the contract were in fact authorized, what is the legal effect when the appellees accepted the contracts including the "planting, etc.," feature? The rule is well stated in 2 C. J. Sec. 99, page 481, to-wit: "Although a principal has an election either to repudiate or to ratify an unauthorized act of an agent on his behalf, he cannot without the consent of the other party to the transaction, ratify in part or repudiate in part, he either must repudiate or ratify the whole transaction. He cannot ratify that part which is beneficial to himself and reject the remainder, but with the benefits he must take the burdens, nor can he make the ratification conditional upon the suf-

fering no loss \* \* \* he cannot ratify without becoming bound by the representations and warranties and all other instrumentalities employed by the agent as an inducement to bring about the contract."

## V.

Counsel for appellees contend that the owners should not be held liable for anything more than the money actually paid to them, and cites the case of *Daniel v. Mitchell*, 1 Story 172. Fed. Cases No. 3562, and *Mason v. Crosby*, 1 Woodb. & M., 342 Fed. Case No. 9234, in support of his contention. In the *Daniel v. Mitchell* case the contract of sale was rescinded on the ground of mutual mistake, there were several owners of the lands sold and each who had received any portion of the money or notes had

to return the same, but Daniel, to whom the land had been deeded, was ordered to reconvey when he had been repaid in full. In the *Mason v. Crosby* case all of the parties who owned interests in the land sold were not made parties to the bill and under the facts ascertained the court after handing down his opinion referred the case to a master to report on details of the deal. It appears that the contract sought to be rescinded was made in 1835, the fraud was discovered in the fall of 1836 and suit was not brought until August, 1841, and it was upon this point that the court in considering the master's report to determine the extent of the liability of the defendants the court (see *Mason v. Crosby*, Fed. Case No. 9235, page 1028), says, "The legal title to the land was in the defendants, and the deed was executed by them. But by an agreement between the parties concerned in the speculation. these two defendants were to have but one-sixth each of the interest in the purchase of Smith. Two-thirds was in several other persons, and this was known soon after, if not at the time when the bargain was completed. The money which was paid was distributed among the parties in proportion to the interest they had under this agreement. These persons should properly have been made parties, and if not known when the original bill was filed, should have been brought into the case by a supplemental bill. As this has not been done, the decree cannot affect their rights. Still, as Crosby and Brastow held the whole legal title, and were ostensibly the sole contracting parties, they might, perhaps, if the suit had been commenced as soon as the fraud was discovered, have been held for the whole and left to seek contributions among the

other parties in interest." Thus it is clearly seen that laches alone prevented a full recovery against the defendants.

The rule is stated in 2 C. J., page 849, Sec. 534, under title "Fraud, acts of fraud by the agent committed in the course or scope of his employment, are also binding on the principal, even though the principal did not in fact know of or authorize the commission of the fraudulent acts, and although he derives no benefit from the success of the fraud."

This is the rule sustained in the case of *McIntire v. Pryor*, 173 U. S. 38, 19 S. Ct. 352, see also note (a) 2 C. J., page 850. To like effect are the holdings in the case of *Alger v. Keith*, 105 Fed. 105, and *Alger v. Anderson*, 78 Fed. 729, 735.

Counsel for appellees referring to the case of *Alger v. Keith*, *supra*, which we cited in our prior brief, seeks to create the impression that Anderson, owner of the land, was held to full restitution because he personally made false representations as to the land, and cites the court's attention to the opinion at page 113. A reading of the opinion will disclose no such fact. And the reason Gonce was not held liable was because he was not concerned in the sale of the lands to Alger, but in fact had given Anderson an option on certain lands owned by him and had at Anderson's request delivered title to Alger by placing a deed in escrow to be delivered upon payment of the purchase price.

## VI.

Both counsel for the owners and the Land Company have cited and quoted at length from the

opinion in the case of *Cooper v. Hillsboro Garden Tracts (Ore.)*, 152 Pac. 488. We are not concerned with the facts nor the application of the law to the facts in the *Cooper* case, nor is this court trying the *Cooper* case.

In the case at bar the lower court granted a rescission of the contracts held by the appellants and on all of the defenses tendered on the question as to whether there had in fact been a ratification of the contracts in controversy, the court upon a consideration of all the facts held that there had been no ratification and the findings of the lower court on the question of ratification has not been brought to this court by any assignment of error for review and is therefore not before this court for consideration.

Under the law let us then determine what effect the assignments of the two contracts to appellants had upon their right to maintain a suit for rescission thereof and to recover the payments made thereunder.

Under the bill of complaint it was alleged and this fact was not controverted by either the answer of the Land Company or the appellees that for a valuable consideration the appellant acquired all of the rights of property under the two assigned contracts. (See Record, pages 12 and 13.) An examination of such assignments will disclose that the entire rights of property under each contract was conveyed by the assignments and not merely the right to litigate.

As to Mr. Hart's contract, which he assigned

to his wife, he has testified (see Record, page 91) in relation to the tract purchased by him that "The money used in the purchase of this tract belonged to my wife and the payments made afterwards were made with her money and that is an explanation of my assigning this contract over to her." So much for the character of the assignments.

Appellants contend that having acquired all of the rights of their assignors in and to the contracts assigned that such assignments carry with it the right to employ any remedy which was open to the assignor.

The contracts assigned are Oregon contracts and the rights and liabilities arising thereunder are to be construed in accordance with the laws of Oregon. Accordingly, the question whether the assignment of the respective contracts conferred upon the appellants the right to maintain this suit must be decided according to the laws of Oregon.

This question should have been raised in the lower court by defendants filing a demurrer to the Bill of Complaint. This, however, was not done and upon a trial of the case on its merits the lower court after hearing all the evidence, entered its decree granting a rescission of the contracts in controversy.

What then is the legal effect of the assignments of the controversy under the allegations of the bill of complaint?

In the case of *Dahms v. Sears*, 13 Ore. 47, 58, it was held that, "if the wrongful act is of such a

character that the damages resulting therefrom, upon the death of the person injured, survive to his personal representatives, the right of action is assignable. A wrong committed upon a person resulting in damages by reason of assault and battery, breach of promise of marriage, etc., are causes which do not survive the death of the injured party and are therefore not assignable." This was the test applied by the Supreme Court of Oregon in the case of *Sperry v. Stennick*, 64 Ore. 96, in which case it appears that a corporation had secured a contract for the purchase of land, which contract was thereafter assigned for a valuable consideration to the plaintiffs. The vendors had made false representations which had induced the assignor to make the contract. The plaintiff as assignee brought an action to recover the money paid by the assignor corporation under the contract. The lower court refused to receive any evidence of the false representations and gave judgment of non-suit after the plaintiffs had introduced their evidence, which the court refused to permit to go to the jury.

The supreme court reversed the decision of the lower court and held that action was one which would survive and was therefore assignable and the assignment of the contract for a valuable consideration gave to the assignee the right to pursue any remedy to recover the money paid under the contract induced by fraud which the assignor might have pursued.

Let us now determine what causes of action or suit survive under the laws of Oregon.

Secs. 378 and 379, Title V, Chap. VI, Lord's Ore-

gon Laws, are as follows:

Sec. 378. What causes of action do not survive: A cause of action arising out of an injury to the person, dies with the person of either party, except as provided in section 380. (Sec. 380 provides that where the death of a person is caused by wrongful act or omission of another that the personal representative may recover in an action at law not to exceed \$7,500.00.)

Sec. 379. What causes of action do survive: "All other causes of action, by one person against another, whether arising on contract or otherwise, survive to the personal representative of the former and against the personal representatives of the latter."

Sec. 484, Title VI, Chap. VII, Lord's Oregon Laws, provides among other things, "All causes of suit by one person against another, however arising, survive to the personal representatives of the former and against the personal representatives of the latter."

In the case of *Barker v. Ladd*, Fed. Cases No. 990, 3 Saw. 44, which was an action for damages for misrepresentations of defendants inducing the sale of corporate stock, the plaintiff died and his administrator sought to continue the action, the court held in construing Secs. 365 and 366 of the Oregon Code (now Secs. 378 and 379 Lord's Oregon Laws) that the cause of action survived and that the law of the state furnishes the rule for the federal court.

It is apparent therefore that one having a cause of suit to secure the rescission of a contract on the

ground of fraud that under Secs. 379 or 484, Lord's Oregon Laws, the same would survive to his personal representatives **and would therefore be assignable.**

In the case of *Com. S. S. Co. v. Am. Ship Bldg. Co.*, 197 Fed. 780, the plaintiff, a corporation, sought to secure the rescission of a contract as assignee thereof on the ground of fraud perpetrated on the assignor inducing the making of the contract and to recover the money and property its assignor parted with under the contract. Defendants demurred to the complaint, and asserted that the right to rescission was personal to the assignor and did not pass with the assignment of the contract. The court in its opinion overruling the demurrer, in part says:

"The Ohio law recognizes that a chose in action which is transmissible to an executor or administrator under the law of Ohio is assignable in equity. *Grant v. Ludlow*, 8 Ohio St. 1. And that survivability and assignability of things in action are convertible terms. *The Village of Cardington v. Fredricks*, 46 Ohio St. 442, 448, 21 N. E. 766; *Cincinnati v. Hafer*, 49 Ohio St. 60, 66, 30 N. E. 197.

"The Ohio law being that all causes of action which are survivable are assignable, it is important to determine whether the cause of action herein involved, namely a cause of action for deceit or fraud, survives.

"Section 11,235 of the General Code of Ohio, formerly section 4975 of the Rev. Stats. of Ohio, provides:

“ ‘In addition to the causes which survive at common law, causes of action for mesne profits, or injuries to the persons or property, or for deceit or fraud, also shall survive; and the action may be brought notwithstanding the death of the person entitled or liable thereto.’ ”

“This section states, as will be observed, that causes of action for ‘Mesne profits, or injuries to the person or property, or for deceit or fraud,’ are survivable actions. If any action for deceit or fraud is a survivable action in Ohio, it is an assignable cause of action for the purposes of this inquiry.

“What constitutes fraud has been ably considered by Chief Justice Fuller, in delivering the opinion of the supreme court in the case of *Moore v. Crawford*, 130 U. S. 128, 9 Sup. Ct. 448. 32 L. Ed. 878. The Chief Justice said:

“ ‘Fraud indeed, in the sense of a court of equity properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed and are injurious to another, or by which an undue and unconscientious advantage is taken of another. And courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done.’ ”

“Considering the provisions of the Ohio statute and the language of this opinion, in my opinion the fraudulent acts complained of in the bills herein

are plainly within the contemplation of the provisions of the Ohio statute.

“The bills which have been demurred to in cases Nos. 8,214 and 8,215 endeavor to make a cause of action for a rescission for fraud, by reason of assignment, the basis of the actions instituted. In view of the statute and the supreme court decision I have referred to, I am of the opinion that such a cause of action is contemplated. This seems to be also the opinion held by the courts of Ohio in the case of *Isham v. Buckeye Stave Co.*, 25 Ohio Cir. Ct. R. 167, and affirmed without report in 72 Ohio St. 660, 76 N. E. 1126. This was an action for the rescission of a contract for the sale of growing timber for fraud inducing the making of said contract, which fraud was not discovered by the decedent in his lifetime. The court held that there was no question but that the cause of action survived to the personal representative and not to the devisee, and this was their conclusion, inasmuch as the subject-matter of the contract was personal property.

“If a cause of action for fraud is assignable, surely the remedy of redressing the wrong passes. It is certainly within the contemplation of all rules of equity that the remedies for the redressing of the wrong must pass with the cause of action. The remedy surviving with the cause of action, the assignee of the cause of action has the right to elect between remedies. The election is not personal, but passes with the cause of action. This doctrine was approved by the court of appeals of this jurisdiction in the recent case of *Berry v. Chase*, 179

Fed. 427, 102 C. C. A. 573, Judge Knappen, delivering the opinion of the court, holding:

“ ‘The owner of a debt upon which he had the right to sue a principal or his agent through whom the debt was contracted, the principal being then undisclosed, in assigning the debt may also transfer to the assignee such right of election.’

“In this opinion the case of Reeder Bros. Shoe Co. v. Prylinski, 102 Mich. 468, 471, 60 N. W. 969, was cited with approval; that case holding that the assignee of a vendor's account for goods sold could, upon discovery of the fraud inducing the sale, rescind the same and recover the goods sold.

“Inasmuch as the Ohio law permits the survivability and assignability of causes of action for fraud, cases from other jurisdictions where the basic law is otherwise are of no importance in connection with these demurrers. A cause of action for fraud may be a valuable asset, and, as the assets of the steamship company originally formed were disposed of to the complainant herein, it would follow that this cause of action, based upon fraud, together with its remedies, passed to the complainant.

“That this chose in action is recognized as property is evident from the opinion of Judge Spear in the case of Reece v. Kyle, 49 Ohio St. 475, 484, 31 N. E. 747, 750 (16 L. R. A. 723). The judge says:

“ ‘It is difficult at best to reconcile the strict law of maintenance and champerty with our ideas of the rights of property, and the right of the citi-

zen to contract. Among the fundamental rights is the right to acquire, possess, and dispose of property. The right of disposition necessarily inheres in the right of ownership. We are taught that a chose in action is as much property as a thing in possession, and that in this day the right to dispose of such property is as high and free from doubt as is the right to sell the horse, or farm, of which the seller has manual possession.'

"This being the attitude of the highest court of the State of Ohio, and the obligation resting upon me to follow the law of Ohio in respect to the question of assignability, it seems plain to me that this action for fraud is assignable, having survivability, and with the assignment of the cause of action carries with it the remedy of rescission."

## VII.

Counsel for appellees contend also that the fact that the contracts of sale were in writing and under seal and did not contain the names of the appellees that they cannot be held as undisclosed principals upon a contract under seal executed by an agent in his own name and cites many authorities to uphold that contention.

This effect of this rule has been abrogated by statute in the State of Oregon.

Sec. 776, Title 9 Chap. 7, Lord's Oregon Laws, provides: "The seal affixed to a writing is primary evidence of a consideration. In other respects there is no difference between sealed and unsealed writings, except as to the time of commencing actions or suits thereon. A writing under seal may

therefore be modified or discharged by a writing not under seal, or by an oral agreement otherwise valid."

In the case of *Olston v. Oregon Water Power Co.*, 52 Ore. 343, the Supreme Court of the State of Oregon was called upon to construe Sec. 776, Lord's Oregon Laws, held "the effect of the seal by our statute, being only prima facie evidence of the consideration, gives to a sealed instrument no greater significance than to one unsealed which expresses the consideration on its face, and either may be attacked at law for fraud in the consideration as well as for fraud in its execution," (see page 353) and (see page 357), "it is deprived of the solemnity formerly ascribed to it by reason of the seal," and (see page 358) \* \* \* "reduced sealed instruments to the footing of simple contracts that express consideration."

It is clear from the foregoing that in Oregon the distinction between sealed and unsealed instruments, recognized at common law has been abolished by statute.

In the case of *Streeter v. Janu* (Minn.), 96 N. W. 1128, which was as stated by the court, "an action by a vendor to enforce payment of an amount due in accordance with the terms of a written executory contract for the purchase and conveyance of real estate. The defendant was not named in the contract nor did he execute it. The claim is that the person named in the instrument as vendee was simply acting as defendant's agent when he made the purchase and executed the contract. It stands admitted that plaintiff had no knowledge

until long afterwards. The contract was under seal. The lower court on motion of defendant's counsel at the close of plaintiff's testimony instructed the jury to return a verdict for defendant."

In the Supreme Court defendant contended that the contract being one under seal, an undisclosed principal cannot be bound or held by its terms. The court held, "The common law rule in respect to the liability of an undisclosed principal is concisely stated in 1 Amer. & Eng. Ency. Pl. & Pr. (2nd Ed.) 1139, etc., and cases are cited which fully support the text. From these citations it appears that, if this instrument were but a simple contract, the right to pursue the undisclosed principal is absolute and unrestricted. If on the other hand the common law distinction between sealed and unsealed instruments remains, and it is a specialty, an undisclosed principal cannot be shown or held liable. No one but the party signing it can be bound by it. But the distinction between sealed and unsealed private writings has been abrogated by Laws 1899, p. 88, C. 86, whereby the use of private seals has been abolished, and it is expressly declared that the addition of a private seal in writing **'shall not affect its character in any respect.'** The result of this legislation is that all differences between simple contracts and specialties, executed by private parties \* \* \* are discarded. With the distinction abolished it follows that testimony tending to show that the act of the alleged agent was within the limits of the power delegated, and that defendant was an undisclosed principal was competent."

Montgomery v. Dresher (Nebr.), 134 N. W. 251, Reese, C. J., in his opinion, says: "Since the use of private seals has been abolished (Ann. St. 1911 Sec. 11, 851) all contracts are upon the same footing as simple contracts. Therefore the same rule should be applied to all."

From the foregoing decisions and in view of effect of Sec. 776 of Lord's Oregon Laws reducing instruments under seal to the plane of simple contracts reciting a consideration, it is evident that whether the contracts are under seal or not would not avail the appellees to avoid liability as undisclosed principals.

### VIII.

Counsel for appellees upon the assumption that there can be no recovery upon the assigned contracts that the appellants claim would be reduced to less than that required amount to give this court jurisdiction, state that it is incumbent upon this court to dismiss the case.

This is an idle assumption. Appellants in the lower court secured a judgment against the Land Company for an amount largely in excess of the jurisdictional amount.

In the federal courts the jurisdictional amount in controversy is the aggregate amount prayed for.

Chase v. Roller Mills Co., 56 Fed. 625.

Bowden v. Burnham, 56 Fed. 752.

Heffner v. Gwynne, T. C. Co., 160 Fed. 635.

### CONCLUSION.

We will not tire the court with a needless re-

sume of the questions before it on appeal.

The appellants Harding Land Company have brought no question to this court for review under so-called assignments of error, which are not in conformity with the requirements of Rule 11 of this court.

The only questions for review properly before this court arise under appellants Hart assignments of error.

It may be fairly insisted that this court upon a consideration of the questions before it for review and the application of the law thereto that not only should the decree of the lower court be affirmed, but that said decree should be modified to the extent of including a judgment against the land owners for the return of the money paid under each of the contracts rescinded.

The very character of the land purchased by the appellees and which they placed with the Land Company for its **"exploitation and sale as orchard land"** was a manifest fraud upon any purchaser thereof and one for which the appellees were primarily responsible. Green, one of the owners, had supervision of the planting and cultivation of the tracts sold. Wallace, another of the owners, was stockholder and secretary of the Land Company, during the period this land was being sold; all of the owners except Wallace were farmers and lived in the immediate vicinity of the tracts in controversy, and it would be necessary to close our eyes to evident facts to contend that the owners were honest in their efforts to market the land for orch-

ard purposes, and not know its utter lack of utility for such purpose. It was they who set the **“mischief afoot,”** it is they who actuated by **“greed for large profits,”** and not by sober-minded honesty, have been **“part and parcel”** of the fraud committed in securing the contracts in controversy.

Under the law of Oregon the lower court was certainly not justified in refusing to hold the appellees responsible as **“undisclosed principals”** because the contracts were signed by the Land Company and its corporate seal affixed.

Because of such a seal this court could not say that under the contracts issued the owners could not have been compelled to execute a conveyance, how then can it be said that the owners are not liable as undisclosed principals for the return of the money upon a rescission?

E. A. LUNDBURG,  
Respectfully submitted,  
Solicitor for Appellants Hart.

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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THE UNITED STATES OF AMERICA,  
Plaintiff in Error,  
vs.  
INMAN-POULSEN LUMBER COMPANY,  
a corporation,  
Defendant in Error.

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**Transcript of Record on Writ of Error**

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In Error to the District Court of the United States  
for the District of Oregon.

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**Filed**

NOV 20 1915

F. D. Manekton,  
Clerk.



No. \_\_\_\_\_

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IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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THE UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

INMAN-POULSEN LUMBER COMPANY,

a corporation,

Defendant in Error.

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## Transcript of Record on Writ of Error

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In Error to the District Court of the United States  
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*IN THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH  
CIRCUIT.*

THE UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

INMAN-POULSEN LUMBER COPANY,

Defendant in Error.

NAMES AND ADDRESSES OF THE  
ATTORNEYS OF RECORD:

Mr. Clarence L. Reames, United States Attorney, and  
Mr. John J. Beckman, Assistant United States  
Attorney, Postoffice Building, Portland, Oregon,  
for the Plaintiff in Error.

Cake & Cake, Chamber of Commerce Building, Port-  
land, Oregon, for the Defendant in Error.

## CITATION ON WRIT OF ERROR.

United States of America,  
District of Oregon—ss.

To Inman-Poulsen Lumber Company, a Corporation, and Messrs. Cake and Cake, its Attorneys, greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 31st day of August, in the year of our Lord, one thousand, nine hundred and fifteen.

R. S. BEAN,  
Judge.

United States of America,  
District of Oregon—ss.

Service of the foregoing citation on writ of error, by receipt of a copy thereof duly certified by John J. Beck-

man, of Attorneys for the above entitled plaintiff, together with a like certified copy of petition for writ of error, order allowing writ of error, assignment of errors, and writ of error, is hereby admitted at Portland, Oregon, this first day of September, 1915.

CAKE & CAKE,  
of Attorneys for Defendant in Error.

Filed September 1, 1915. G. H. Marsh, Clerk.

*In the United States Circuit Court of Appeals for the  
Ninth District.*

### WRIT OF ERROR.

The United States of America,

Plaintiff in Error.

vs.

Inman-Poulsen Lumber Company,

a corporation,

Defendant in Error.

The United States of America, ss.

The President of the United States of America.  
To the Judge of the District Court of the United States  
for the District of Oregon:

Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one

of you, between the United States of America, Plaintiff and Plaintiff in Error, and Inman-Poulsen Lumber Company, a corporation, Defendant and Defendant in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward Douglas White,  
Chief Justice of the Supreme Court of the United  
States this 31st day of August, 1915.

G. H. MARSH.

Clerk of the District Court of the United States for the  
District of Oregon.

(Seal)

By.....Deputy.

Filed August 31, 1915. G. H. Marsh, Clerk, United  
States District Court, District of Oregon.

*In the District Court of the United States for the District of Oregon.*

November Term, 1913.

Be it remembered, that on the 8th day of November, 1913, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint, in words and figures as follows, to-wit:

### COMPLAINT.

*In the District Court of the United States for the District of Oregon.*

### COMPLAINT.

United States of America,

Plaintiff,

vs.

Inman-Poulsen Lumber Company,  
a corporation,

Defendant.

Comes now the United States of America, by Jesse L. Sumrall, Assistant United States Attorney for the District of Oregon, by direction of the Attorney General of the United States, and for cause of complaint against the defendant, alleges:

### I.

That at all the times hereinafter mentioned, the defendant, Inman-Poulsen Lumber Company, was and

now is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, having its principal place of business at Portland, Multnomah County, State of Oregon.

## II.

That at all the times hereinafter mentioned, the Southeast Quarter ( $SE\frac{1}{4}$ ) of Section Twenty-one (21), Township Four (4) North, Range Two (2) East Willamette Meridian, was and is now public land of the United States.

## III.

That by virtue of an Act of Congress approved July 2, 1864, (13 Stats. L. 365, 367), incorporating the Northern Pacific Railroad Company and granting to it certain lands to aid in the construction of its road, the above described Southeast Quarter ( $SE\frac{1}{4}$ ) of Section Twenty-one (21), Township Four (4) North, Range Two (2) East Willamette Meridian, became vested in the Northern Pacific Railroad Company by reason of the definite location of said line of railroad opposite said land, on September 22, 1882, and by List No. 19, dated October 24, 1888, a patent issued May 24, 1895, by the United States.

That by the terms of an Act of Congress dated July 1, 1898, (30 Stats. L. 597, 620), the provision was made that certain lands within the grant to said railroad which had been disposed of by the United States or were occu-

pied and claimed as provided in said act, prior to January 1, 1898, might be relinquished by said railroad company to the United States and other lands taken in lieu thereof, and in accordance with the terms of said act, the said railroad company did relinquish to the United States said Southeast Quarter ( $SE\frac{1}{4}$ ) of Section Twenty-one (21), Township Four (4) North, Range Two (2) East Willamette Meridian, said lands having been first listed for relinquishment by the Secretary of the Interior under date of May 2, 1905, by List No. 71, quit-claim deed being given by the railroad company under date of August 5, 1907, which deed was accepted by the United States under date of January 3, 1908.

That by said Act of Congress of July 1, 1898, it is expressly provided that:

“And all right, title and interest of the said railroad grantee, or its successors in interest, in and to any of such tracts which the said railroad grantee, or its successors in interest, may relinquish hereunder, shall revert to the United States, and such tract shall be treated under the laws thereof in the same manner as if no right thereto had ever vested in the said railroad grantee.”

That by reason thereof the said Southeast Quarter ( $SE\frac{1}{4}$ ) of Section Twenty-one (21), Township Four (4) North, Range Two (2) East Willamette Meridian, was public land of the United States for all intents and purposes herein set forth.

#### IV.

That under date of January 3, 1908, the homestead application No. 14387 of William N. Stanley, was al-

lowed for said Southeast Quarter ( $SE\frac{1}{4}$ ) of Section Twenty-one (21), Township Four (4) North, Range Two (2) East Willamette Meridian, by virtue of his claim of settlement on said land prior to January 1, 1898, and on April 6, 1908, said William N. Stanley relinquished said homestead entry to the United States.

That during the period in which said William N. Stanley claimed to occupy said land as an actual bona fide settler, to-wit, during the years 1900, 1901, 1902 and 1903, the said William N. Stanley, together with one George Charley, an Indian, Joe Wilmot and R. A. McLary, as hereinafter more fully set forth, did wrongfully and unlawfully cut and remove from said homestead and settlement claim, large quantities of timber for sale and speculation and not in the course of clearing and improving said land, and said land from which said timber was cut has never been cleared, cultivated or improved and was not intended to be cleared, cultivated or improved by the said William N. Stanley.

## V.

That in the Fall of the year 1901 and in the Spring of the year 1902, the said William N. Stanley and George Charley and Joe Wilmot, well knowing that said above described land was public land of the United States, wrongfully and unlawfully cut and removed from said land, 100,000 feet of red fir timber then standing and growing thereon, and placed the same in Lewis River in the state of Washington at what is known as the forks of said river; that upon placing said timber in

said river, the said William N. Stanley, George Charley and Joe Wilmot thereupon formed the same into rafts in said river and when said logs were so placed in said rafts in said river as aforesaid, they were of the reasonable value of five dollars per thousand feet, and thereupon during the Spring of 1902, the said William N. Stanley, George Charley and Joe Wilmot wrongfully and unlawfully sold said timber in the rafts, to the defendant Inman-Poulsen Lumber Company, and thereafter delivered the same to the said Inman-Poulsen Lumber Company in said rafts at the forks of said river, to the amount of 100,000 feet of red fir timber.

That in the Fall of the year 1902 and in the Spring of the year 1903, the said William N. Stanley and Robert McLary, the latter now deceased, well knowing the said above described land was public land of the United States, wrongfully and unlawfully cut and removed from said land, 1,000,000 feet of red fir timber then standing and growing thereon, and placed the same in Lewis River in the state of Washington at what is known as the forks of said river; that upon placing said lumber in said river, said William N. Stanley and Robert McLary thereupon formed the same into rafts in the said river, and when said logs were so placed in said rafts in said river as aforesaid, they were of the reasonable value of five dollars per thousand feet; that thereupon during the Spring of 1903, the said William N. Stanley and Robert McLary wrongfully and unlawfully sold the said timber in said rafts to the said defendant, Inman-Poulsen Lumber Company, and thereafter deliv-

ered the same to the Inman-Poulsen Lumber Company in the said rafts at the forks of said Lewis River, to the amount of one million feet of red fir timber.

That by reason of the foregoing facts, the said plaintiff was and is damaged in the sum of Five Thousand, Five Hundred (\$5,500.00) Dollars.

## VI.

That prior to the commencement of this action, the said plaintiff demanded of the said defendant, Inman-Poulsen Lumber Company, payment for said lumber, but said defendant refused to pay the same or any part thereof and does now refuse to pay for same.

Wherefore plaintiff demands judgment against the said defendant, Inman-Poulsen Lumber Company, in the sum of Five Thousand Five Hundred (\$5,500.00) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the 25th day of February, 1913, the date upon which demand was first made upon said defendant for payment of said sum and for plaintiff's costs and disbursements of this action.

Dated at Portland, Oregon, this 8th day of November, 1913.

JESSE L. SUMRALL,

Assistant United States Attorney for the District of Oregon.

United States of America,

District and State of Oregon—ss.

I, Jesse L. Sumrall, being first duly sworn depose and say that I am the Assistant United States Attorney for the District of Oregon heretofore mentioned; that the facts set forth in the foregoing complaint are true as I verily believe and that I base this affidavit of verification upon reports and affidavits in my possession transmitted to me by the Department of Justice of the United States of America.

(Sgd) JESSE L. SUMRALL.

Subscribed and sworn to before me this 8th day of November, 1913.

(Seal)

HENRY McCONNELL,  
Notary Public for Oregon.

Filed November 8, 1913. A. M. Cannon, Clerk.

And afterwards, to wit, on the 22nd day of November, 1913, there was duly filed in said Court and cause, a Demurrer to the complaint in words and figures as follows, to wit:

### DEMURRER.

Comes now the defendant above named and demurs to the complaint filed herein upon the following grounds:

1. That said complaint does not state facts sufficient to constitute a cause of action on the part of the plaintiff against the defendant.

2. That it appears upon the face of said complaint that the timber therein alleged to have been purchased by this defendant in the years 1900, 1901, 1902, and 1903, was not cut or removed from the public lands of the United States, or from any land of the United States, and was not the property of the United States.

(Signed) CAKE & CAKE,  
Attorneys for Defendant.

District of Oregon,  
County of Multnomah—ss.

I, W. M. Cake, one of counsel for defendant herein, hereby certify that the foregoing demurrer to plaintiff's complaint is in my opinion well founded in point of law.

(Sgd.) W. M. Cake,  
One of Counsel for Defendant.

District of Oregon,  
County of Multnomah—ss.

I, G. W. Thatcher, being first duly sworn, depose and say that I am the Vice President of the Inman, Poulsen Lumber Company, a corporation, defendant herein, and that the demurrer of the defendant to the complaint of the plaintiff is not interposed for delay.

(Sgd.) G. W. Thatcher.

Subscribed and sworn to before me this 22nd day of November, 1913.

(Sgd.) John T. McKee,  
Notary Public for Oregon.

(Seal)

Service by copy admitted this 22nd day of November, 1913.

(Sgd.) Jesse L. Sumrall,  
Attorney for Plaintiff.

Filed November 22, 1913, A. M. Cannon, Clerk.

And afterwards, to-wit, on Monday, the 23rd day of February, 1914, the same being the 94th judicial day of the regular November, 1914, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

### ORDER SUSTAINING DEMURRER.

This cause was heard on the demurrer of the defendant to the complaint herein and was argued by Mr. John D. Beckman, Assistant United States Attorney and by Mr. W. M. Cake, of counsel for said defendant; on consideration whereof, it is ordered and adjudged that said demurrer be and the same is hereby sustained.

And afterwards, to-wit, on the 23rd day of February, 1914, there was duly filed in said Court, and cause, an Opinion of the Demurrer to the Complaint, in words and figures as follows, to-wit:

### OPINION.

John J. Beckman, Assistant U. S. Attorney for Plaintiff.

Judge W. M. Cake for Defendant.

Memorandum by

BEAN, District Judge, on Demurrer to Complaint.

The action is to recover the value of timber cut and removed from 160 acres of land by one Stanley, and purchased by the defendant. The land from which the timber was removed is within the limits of the grant by Congress to the Northern Pacific Railroad Company, of July 2, 1864, (13 Sts. at Large 365), to aid in the construction of its road, and was duly patented to the company on May 24, 1895. On May 2, 1905, it was listed by the Secretary of the Interior for relinquishment to the Government, under the act of July 1, 1898, (30 Stat. at Large 620), which provides that where certain lands within the grant have been disposed of by the United States or settled upon or claimed in good faith by any qualified settler prior to January 1, 1898, under color of title or claim of right under some law of the United States or ruling of the Interior Department, and the settler or purchaser refuses to transfer his entry as therein provided, the railroad grantee or its successor may upon a proper relinquishment of such land select an equal quantity of public land in lieu thereof. The land was actually conveyed to the United States by the Railroad Company on January 3, 1908. On the same day Stanley's application for a homestead entry thereon was allowed, in which he claimed settlement prior to January 1, 1898, but such entry was relinquished in April following. During the years 1900 to 1903, prior to the allowance of his homestead application, and while the

title to the land was in the Railroad Company, Stanley cut and removed a large quantity of timber therefrom, and sold the same to the defendant.

The plaintiff brings this action to recover the value of such timber, claiming that the effect of the relinquishment of the land to the Government by the Railroad Company, after the timber had been cut and removed, is to vest in the Government a right of action therefor. There is no averment that the timber was cut and removed without the knowledge or consent of the Railroad Company, or that the land from which it was cut had been disposed of by the United States to any one other than the Railroad Company, prior to January 1, 1898, or had been settled upon or claimed in good faith prior to that date by any qualified settler under any law of the United States or ruling of the Interior Department. The defendant has demurred to the complaint, and in my judgment it should be sustained.

The action is essentially in trover, and to entitle the plaintiff to recover it is necessary for it to show a general or special property in the timber cut and a right to the possession of the same at the commencement of the action. 38 Cyc. 1004 et seq. *United States v. Loughrey*, 172 U. S. 206. And this it does not do. On the contrary, it appears from the complaint that the title to the land, and consequently to the timber growing thereon, was in the Railroad Company at the time the timber was cut and removed, and presumably the land was in the possession of the company through some one holding under it. After the timber had been cut and

removed the land was relinquished to the plaintiff, as provided in the Act of July 1, 1898, but I can find nothing in such act which vests or is intended to vest in the Government a right of action for timber cut and removed prior to such relinquishment. The provision that all right, title and interest of the Railroad Company or its grantees in land relinquished "shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railroad grantee," has reference to the title and the treatment thereof after the relinquishment, and does not vest the Government with the title to the land or the timber growing thereon, or the right to possession thereof, prior to relinquishment, or with any right of action the Railroad Company may have had for the timber. The act provides when and under what circumstances the Railroad Company or its grantee might make a relinquishment, but an actual relinquishment was necessary to vest title in the Government. Until the land was actually relinquished, the legal title, with the ownership of the timber growing thereon, was in the Railroad Company, and the United States could not have maintained an action for trespass against one going thereon and cutting and removing the timber therefrom. *United States v. Loughrey*, 172 U. S. 206. The case of *Humbird v. Avery*, 195 U. S. 506, was a controversy between purchasers from the Railroad Company and parties claiming under color of title under some law of the United States or ruling of the Interior Department, and involved a question of title only, and not the right acquired by the United States by a relinquishment regularly made.

As the Government had no title to the land or timber at the time the timber was cut and removed or the action commenced, it cannot, in my judgment, maintain an action to recover the value thereof.

Filed February 23, 1914, A. M. Cannon, Clerk.

And afterwards, to-wit, on the 24th day of September, 1914, there was duly filed in said Court and cause, a Second Amended Complaint in words and figures as follows, to-wit:

## SECOND AMENDED COMPLAINT.

Comes now the United States of America, by John J. Beckman, Assistant United States Attorney for the District of Oregon, under and by the authority and direction of the Attorney General of the United States, and having first obtained leave of Court, files this its second amended complaint and for cause of action against the defendant herein complains and alleges:

### I.

That at all the times hereinafter mentioned, the defendant, Inman-Poulsen Lumber Company, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, having its principal place of business at Portland, Multnomah County, State of Oregon.

## II.

That at all the times hereinafter mentioned, the Southeast Quarter ( $SE\frac{1}{4}$ ) of Section Twenty-one (21), Township Four (4) North, Range Two (2) East, of the Willamette Meridian, was and now is public land of the United States of America.

## III.

That by virtue of an Act of Congress approved July 2, 1864 (13 Stats. L. 365, 367), incorporating the Northern Pacific Railroad Company and granting to it certain lands to aid in the construction of its road, the above described Southeast Quarter ( $SE\frac{1}{4}$ ) of Section Twenty-one (21), Township Four (4) North, Range Two (2) East, Willamette Meridian, became vested in the Northern Pacific Railroad Company by reason of the definite location of said line of railroad opposite said land, on September 22, 1882, and that by List No. 19, dated October 24, 1888, a patent issued to the said Northern Pacific Railroad Company on May 24, 1895, by the United States.

That by the terms of an Act of Congress dated July 1, 1898, (30 Stats. L. 597, 620), a provision was made by which certain lands within the grant to said railroad company, above mentioned, which had been disposed of by the United States or were occupied and claimed as provided in said Act prior to January 1, 1898, might be relinquished by said railroad company to the United States and other lands taken in lieu there-

of, and in accordance with the terms of said Act of July 1, 1898, the said railroad company did relinquish to the United States the said Southeast Quarter ( $SE\frac{1}{4}$ ) of Section Twenty-one (21), Township Four (4) North, Range Two (2) East Willamette Meridian, said lands having been first listed for relinquishment by the Secretary of Interior of the United States under date of May 2, 1905, by List No. 71, and that a quit-claim deed was given by the said railroad company to the said lands herein described, on or about the 5th day of August, 1907, which said deed was accepted by the United States on or about the 3rd day of January, 1908.

That by the said Act of Congress of July 1, 1898, aforesaid, it was therein expressly provided that:

“And all right, title and interest of the said railroad grantee, or its successors in interest, in and to any of such tracts which the said railroad grantee, or its successors in interest, may relinquish hereunder, shall revert to the United States, and such tract shall be treated under the laws thereof in the same manner as if no right thereto had ever vested in the said railroad grantee.”

That by reason of the premises aforesaid, the said Southeast Quarter ( $SE\frac{1}{4}$ ) of Section Twenty-one (21), Township Four (4) North, Range Two (2) East, Willamette Meridian, at all times from and after the 1st day of July, 1898, was and now is public land of the United States for all the intents and purposes herein set forth.

IV.

That on to-wit: January 28, 1908, the homestead application No. 14387 of William N. Stanley was allowed by the officers of the General Land Office of the United States for the said Southeast Quarter ( $SE\frac{1}{4}$ ) of Section Twenty-one (21), Township Four (4) North, Range Two (2) East, Willamette Meridian, by virtue of the claim of settlement of the said William N. Stanley on said lands as an actual bona fide settler, prior to January 1, 1898, to-wit: in, from and after the year 1891; that in further support of said homestead application No. 14387 the said William N. Stanley submitted proof to the said officers of the said General Land Office that he had made and filed a homestead application for the said land on or about December 30, 1896, in which said application he alleged settlement and residence on said land in and since the year 1891; that on, to-wit: the 6th day of April, 1908, the said William N. Stanley relinquished the said homestead entry No. 14387 to the United States.

That during the period in which said William N. Stanley claimed to occupy said land as an actual bona fide settler, to-wit: during the year 1900, 1901, 1902 and 1903, the said William N. Stanley, together with one George Charlie, an Indian, Joe Wilmot and R. A. McLary, as hereinafter more fully set forth in paragraph V of this second amended complaint, did wrongfully and unlawfully cut and remove from said homestead and settlement claim large quantities of timber for sale and speculation and not in the course of clear-

ing and improving said land, and said land from which said timber was so cut and removed as aforesaid has never been cleared, cultivated or improved and was not intended to be cleared, cultivated or improved by the said William N. Stanley.

## V.

That in the fall of the year 1901 and in the spring of the year 1902, the said William N. Stanley and George Charlie and Joe Wilmot, well knowing that said above described land was public land of the United States, did wrongfully and unlawfully cut and remove from said land, hereinabove fully described, 100,000 feet of red fir timber then standing and growing thereon and placed the same in the Lewis River in the State of Washington at what is known as the forks of said river; that upon placing said timber in said river, the said William N. Stanley, George Charlie and Joe Wilmot thereupon formed the same into rafts in said river; that when said logs were so placed in said rafts in said river as aforesaid, they were of the reasonable value of five dollars per thousand feet; that thereupon during the spring of the year 1902, the said William N. Stanley, George Charlie and Joe Wilmot wrongfully and unlawfully sold said timber in the said rafts, as aforesaid, to the defendant Inman-Poulsen Lumber Company, and thereafter delivered the same to the said Inman-Poulsen Lumber Company in said rafts in the forks of said river to the amount of 100,000 feet of red fir timber.

That in the fall of the year 1902 and in the spring of the year 1903, the said William N. Stanley and R. A. McLary, the latter now deceased, well knowing the said above described land was public land of the United States, did wrongfully and unlawfully cut and remove from said land 1,000,000 feet of red fir timber then and there standing and growing thereon, and place the same in Lewis river in the state of Washington at what is known as the forks of said river; that upon placing said lumber in said river, said William N. Stanley and R. A. McLary thereupon formed the same into rafts in the said river; that when the said lumber was so placed in said rafts in said river as aforesaid it was of the reasonable value of five dollars per thousand feet; that thereupon during the spring of the year 1903, the said William N. Stanley and R. A. McLary wrongfully and unlawfully sold the said lumber in the said rafts to the said defendant Inman-Poulsen Lumber Company, and thereafter delivered the same to the said Inman-Poulsen Lumber Company in the said rafts at the forks of said Lewis River to the amount of one million feet of red fir timber.

That the said timber so cut, removed and sold as aforesaid, by the said William N. Stanley, George Charlie, Joe Wilmot and R. A. McLary, aforesaid, at and during the time aforesaid, was so cut, removed and sold without the knowledge, consent or permission of the said Northern Pacific Railroad Company, or its successors or assigns in interest, and without the knowledge, consent or permission of the United States of America.

## VI.

That by reason of the foregoing facts the United States of America, plaintiff herein, was and is damaged in the sum of Five Thousand and Five Hundred (\$5,500.00) Dollars.

## VII.

That prior to the commencement of this action, on to wit: the 25th day of February, 1913, this plaintiff demanded of the said defendant Inman-Poulsen Lumber Company payment for said lumber but said defendant refused to pay for the same or any part thereof and does now refuse to pay for the same.

WHEREFORE, plaintiff demands judgment against the said defendant Inman-Poulsen Lumber Company in the sum of Five Thousand Five Hundred (\$5,500.00) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the 25th day of February, 1913, and for costs and disbursements in this action incurred.

JOHN J. BECKMAN,

Assistant United States Attorney for the District of Oregon.

United States of America,  
State and District of Oregon,  
County of Multnomah—ss.

I, John J. Beckman, being first duly sworn depose and say that I am the Assistant United States Attor-

ney heretofore mentioned; that the facts set forth in the foregoing second amended complaint are true as I verily believe, and that I base this affidavit of verification upon reports and affidavits in my possession transmitted to me by the Department of Justice of the United States.

JOHN J. BECKMAN.

Subscribed and sworn to before me this 23rd day of September, 1914.

(Seal)

HENRY McCONNELL,  
Notary Public for Oregon.

Due and legal service of the within second amended complaint by delivery of a duly certified copy thereof, is hereby acknowledged this 24th day of September, 1914, at Portland, Oregon.

Cake & Cake,  
Attorneys for Defendant.

Filed September 24, 1914. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 21st day of January, 1915, there was duly filed in said Court and cause, a Demurrer to the Second Amended Complaint, in words and figures as follows, to-wit:

### DEMURRER TO SECOND AMENDED COMPLAINT.

Comes now the defendant above named and demurs to the second amended complaint filed herein for the

reason and upon the ground that said complaint does not state facts sufficient to constitute a cause of action against the defendant herein.

(Sgd) Cake & Cake,  
Attorneys for Defendant.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

(Sgd) W. M. Cake,  
of Attorneys for Defendant.

Service by copy admitted this 21st day of January, 1915.

(Sgd) John J. Beckman,  
Attorneys for Plaintiff.

Filed January 21, 1915, G. H. Marsh, Clerk.

And afterwards, on Monday, the 22nd day of February, 1915, the same being the 97th judicial day of the regular November term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

## ORDER SUSTAINING DEMURRER TO SECOND AMENDED COMPLAINT.

This cause was heard upon the demurrer to the second amended complaint here, and was argued by Mr. John J. Beckman, Assistant United States Attorney, and by Mr. John McKee, of counsel for defendant. On consideration whereof, it is ordered and adjudged that said demurrer be, and the same is hereby sustained.

And afterwards, to-wit, on the 22nd day of February, 1915, there was duly filed in said Court and cause, an Opinion on the Demurrer to the Second Amended Complaint, in words and figures as follows, to-wit:

### OPINION.

Portland, Oregon, February 22, 1915, 10 a. m.

R. S. Bean, District Judge: (ORAL)

The case of the United States vs. Inman-Poulsen Lumber Company is an action to recover the value of certain timber that was cut from the land described in the complaint while the title thereto was in the Northern

Pacific Railroad Company and before it had surrendered or conveyed the land to the government. A demurrer was sustained to the original complaint and an amended complaint has been substituted the same as the original except that it alleges certain facts which, if true, show that the relinquishment of the Northern Pacific Railroad Company was in pursuance and accordance with the terms of an act of congress of July 1, 1898, but it does not change the substantive cause of action nor the ground upon which the demurrer to the original complaint was sustained, which was that at the time the timber was cut the government of the United States had no interest in the matter. The title was in the Northern Pacific Railroad Company and there is no averment that the cause of action, if there ever was one, had been transferred to the government, so the demurrer will be sustained.

Filed February 22, 1915, G. H. Marsh, Clerk.

And afterwards, to-wit, on the 15th day of March, 1915, there was duly filed in said Court and cause, the election of plaintiff to stand on the Second Amended Complaint in words and figures as follows, to-wit:

### ELECTION TO STAND ON AMENDED COMPLAINT.

Comes now the plaintiff, United States of America, by John J. Beckman, Assistant United States Attorney for Oregon, and attorney for the plaintiff above named,

and represent to the court that the plaintiff is unable to further amend its second amended complaint heretofore filed in the above entitled cause and by this Honorable Court, on the 22nd day of February, 1915, held insufficient upon demurrer by plaintiff and by reason thereof the plaintiff hereby elects to stand upon its second amended complaint heretofore filed, as aforesaid.

Dated at Portland, Oregon, this 15th day of March, 1915.

John J. Beckman,  
Attorney for Plaintiff.

Filed March 15, 1915, G. H. Marsh, Clerk.

And afterwards, to-wit, on Monday, the 15th day of March, 1915, the same being the 13th judicial day of the regular March term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

### JUDGMENT.

Now, at this day, come the plaintiff by Mr. Everett A. Johnson, Assistant United States Attorney, and the defendant by Mr. John McKee, of counsel, whereupon said defendant moves the Court for a judgment upon the pleadings herein, dismissing the complaint of said plaintiff, and it appearing to the Court that the demurrer of the said defendant to the second amended complaint has heretofore been sustained by the Court, and

that said plaintiff has filed a notice that it elects to stand upon said amended complaint and will not further amend the pleading, it is hereby considered that said plaintiff take nothing by this action, and that said defendant go hence without day, and that the complaint in this cause be and it is hereby dismissed.

And afterwards, to-wit, on the 31st day of August, 1915, there was duly filed in said Court and cause, a Petition for Writ of Error, in words and figures as follows, to-wit:

### PETITION FOR WRIT OF ERROR.

Comes now plaintiff, United States of America, by John J. Beckman, Assistant United States Attorney, under and by authority and direction of the Attorney General of the United States, and says that on or about the 15th day of March, 1915, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which this plaintiff filed with this petition.

Wherefore, this plaintiff prays that a Writ of Error may be issued in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this

cause duly authenticated may be sent to said Circuit Court of Appeals for said circuit.

John J. Beckman,  
Attorney for Plaintiff.

Filed August 31, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 31st day of August, 1915, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, to-wit:

## ASSIGNMENT OF ERRORS.

The United States of America, plaintiff in this action, in connection with and as a part of its Petition for a Writ of Error filed herein, makes the following assignment of errors, which it avers were committed by the court in the rendition of the judgment against this plaintiff appearing on the record herein, that is to say:

### I.

That the court erred in holding and deciding that the second amended complaint of this plaintiff herein filed did not state facts sufficient to constitute a cause of action against the defendant.

### II.

That the court erred in sustaining the demurrer to the defendant, herein filed, to the second amended complaint of the plaintiff.

## III.

That the court erred in rendering judgment against this plaintiff upon the sustaining of the demurrer of the defendant.

## IV.

That the court erred in not holding and deciding that the second amended complaint of the plaintiff herein filed stated a cause of action against the defendant.

## V.

That the court erred in not overruling the demurrer of the defendant to the second amended complaint filed by the plaintiff in this cause.

Wherefore this plaintiff prays that the said judgment be reversed.

John J. Beckman.  
Attorney for Plaintiff.

Filed August 31, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on Tuesday, the 31st day of August, 1915, the same being the 50th judicial day of the regular July term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

## ORDER ALLOWING WRIT OF ERROR.

On this 31st day of August, 1915, the above named plaintiff appearing by John J. Beckman, Assistant United States Attorney, and filing herein and presenting to the court its Petition praying for the allowance of a Writ of Error and Assignment of Errors intended to be urged by it, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises;

Now, on consideration thereof the court does allow the Writ of Error as prayed in the Petition of plaintiff without bond of the plaintiff, it appearing that the above entitled cause is one in which the United States of America is appellant, and is brought under and by direction of the Attorney General of the United States.

R. S. BEAN,  
Judge of the District Court.

Dated this 31st day of August, A. D. 1915.

Filed August 31, 1915. G. H. Marsh, Clerk.

## CLERK'S CERTIFICATE TO TRANSCRIPT.

United States of America,  
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record in the case in said court in which the United States of America is plaintiff and plaintiff in error and the Inman Polsen Lumber Company, a corporation, is defendant and defendant in error, in accordance with the law and the rules of this court, and the *praecipe* filed by the United States Attorney in said case, and that the said transcript is a true and correct transcript of the record and proceedings had in said court, in accordance with the said *praecipe*, as the same appear of record and on file at my office and in my custody, and

I further certify that the cost of the foregoing transcript is \$                      for the fees of the clerk in preparing said transcript, and that the same has been charged in my account against the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland in said District this                      day of November, A. D. 1915.

Clerk.

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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UNITED STATES OF AMERICA,  
Plaintiff in Error.

vs.

INMAN-POULSEN LUMBER CO.,  
a corporation,  
Defendant in Error.

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**BRIEF OF PLAINTIFF IN ERROR**

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Upon Writ of Error to the District Court of the United  
States for the District of Oregon.

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Clarence L. Reames, United States Attorney for Oregon, and John J. Beckman, Assistant United States Attorney, both of Portland, Oregon, Attorneys for Plaintiff in Error.

Cake & Cake, of Portland, Oregon, Attorneys for Defendant in Error.

**Filed**

FEB 8 - 1916

**F. D. Monckton,**  
Clerk.



*In the United States Circuit Court of Appeals, for  
the Ninth Circuit.*

UNITED STATES OF AMERICA,

Plaintiff in Error.

vs.

INMAN-POULSEN LUMBER CO.,

a corporation,

Defendant in Error.

### STATEMENT OF FACTS.

This is an action brought by the United States to recover damages for the value of timber cut from a certain quarter section of land situated in the State of Washington, particularly described as the SE $\frac{1}{4}$  section 21, Township 4 N. R. 2 E. W. M. The timber is alleged to have been unlawfully cut by one William N. Stanley, and by him sold to the defendant, Inman-Poulsen Lumber Company.

The defendant demurred to the plaintiff's complaint on the ground that it did not state a cause of action. The court below sustained the demurrer, the opinion on which the decision is based being set forth in the record here. The plaintiff thereafter filed a second amended complaint, alleging certain additional facts, the absence of which was commented upon in the court's said opinion, and the defendant again demurred on the same ground as before. The court also sustained this demur-

rer and in its opinion referred largely to the grounds of decision given in sustaining the demurrer to the original complaint. For this reason appellant has set forth in the record herein both of the opinions given by the court and the proceedings upon which same were based.

The plaintiff electing to stand upon his second amended complaint, the court gave judgment for the defendant.

This appellant has assigned as error the action of the court in holding that the second amended complaint does not state a cause of action, and in sustaining defendant's demurrer to the said complaint.

The second amended complaint alleges in substance that the Northern Pacific Railroad Company, by virtue of the Act of Congress of July 2, 1864 (13 Stat. L., 365, 367), was granted certain public lands to aid in construction of its road and that by reason of the subsequent location of the road became vested of a certain quarter section of land particularly described in the complaint, and which is the land from which the timber was cut. This quarter section was patented to the railroad company on May 24, 1895. On July 1, 1898, there was approved an Act of Congress (30 Stat. L., 597, 620) in which provision was made that certain lands within the said grant to the Northern Pacific Railroad Company which had been disposed of by the United States or was occupied and claimed as provided in the said act prior to January 1, 1898, might be relinquished by the said Railroad Company to the United States and other lands taken in lieu thereof. In accordance with

the terms of the said act of 1898, the Railroad Company did relinquish to the United States the quarter section of land described in the complaint. The said land was first listed for relinquishment on May 2, 1905, by the Secretary of the Interior. The Railroad Company gave a quitclaim deed to the United States for the said land on August 5, 1907, and on January 3, 1908, the deed was accepted by the United States. The complaint also alleges that at all times mentioned therein the said quarter section of land was public land of the United States.

The said complaint further alleges that on January 28, 1908, the homestead application of one William N. Stanley was allowed by the General Land Office for the said quarter section of land by virtue of his claim of settlement on said land as an actual bona fide settler prior to January 1, 1898, to-wit, that he was such bona fide settler since the year 1891; that in further support of his said homestead application Stanley submitted proof to the land office that he had made a homestead application for the said land on or about December 30, 1896, in which said application he alleged settlement and residence on the land since the year 1891. On April 6, 1908, Stanley relinquished the homestead entry to the United States. During the time that the said Stanley claimed to occupy the land as an actual bona fide settler, to-wit, during the years 1900, 1901, 1902 and 1903, the said Stanley, together with others, wrongfully and unlawfully cut and removed from his said homestead and settlement claim large quantities of timber for sale and speculation, and not in the course of clearing and improving the land; that the land from which the timber

was so cut and removed had never been cleared, cultivated or improved, and was not intended to be cleared, cultivated or improved by the said Stanley. At various times during the years 1901, 1902 and 1903 the said Stanley and others removed the timber cut by them from the land, placed it in the Lewis River in rafts and sold the timber in the rafts to the defendant Inman-Poulsen Lumber Company, and thereafter delivered the same to the said company; that the timber cut, removed and sold by Stanley and others was so disposed of without the knowledge, consent or permission of either the Northern Pacific Railroad Company, its assigns, or the United States. Plaintiff alleges damages in the sum of \$5500, and demand for payment before the commencement of the suit, and refusal by the defendant company.

## ARGUMENT.

### NATURE OF ACTION.

The complaint is substantially an action in trover for the recovery of the value of the timber wrongfully and unlawfully taken from property owned by the appellant.

To sustain this action plaintiff's complaint must show either that plaintiff had the title to the land described in the complaint from which the timber was cut, at the time the same was cut and removed from the land, or that the plaintiff had possession or the right of immediate possession of the said land or the timber thereon at the time the timber was cut and removed.

It is well settled that a purchaser of timber from a trespasser, who wrongfully cut the timber from the lands of another, is liable to the true owner for the timber or its value, as well as the trespasser, even though he purchased the timber in good faith.

*Woodenware Co. v. U. S.*, 106 U. S. 432.

### PRINCIPAL QUESTION INVOLVED.

As the appellant views this case, the sufficiency of the complaint depends upon whether the act of July 1, 1898 (*supra*), gave the United States such title, possession or right of possession to the land at the time that the timber was cut therefrom as to enable it to maintain an action in trover for the timber cut.

The court below held that the Northern Pacific Railroad Company, having title to the land at the time of cutting of the timber, the United States could not maintain this action, and that the provisions of the Act of July 1, 1898, with reference to the relinquishment of certain granted lands by the Railroad Company and their reversion to the United States, had reference only to the title after relinquishment, and did not vest the Government with title to the lands or the timber growing thereon or the right of possession thereof prior to the relinquishing of the land by the Railroad Company, and did not assign any right of action the Railroad Company may have had for the timber.

## THE PURPOSE AND SCOPE OF THE ACT OF JULY 1, 1898.

This Act was enacted to settle disputes which had existed prior thereto between the Northern Pacific Railroad Company, and occupants and purchasers under the United States land laws, both claiming under the United States. In so far as the Act refers to the questions under discussion we quote from the same as follows:

That where, prior to January first, eighteen hundred and ninety-eight, the whole or any part of an odd numbered section, in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron or coal, and free from valid adverse claim or not occupied by settlers at the time of such selection, situated within any State or Terri-

tory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted; but all selections of unsurveyed lands shall be of odd numbered sections, to be identified by the survey when made, and patent therefor shall issue to and in the name of the corporation surrendering the lands before mentioned, and such patents shall not issue until after the survey: Provided, however, that *the Secretary of the Interior shall from time to time ascertain and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee or its successor in interest a list or lists of the several tracts which have been purchased or settled upon or occupied as aforesaid, and are now claimed by said purchasers or occupants, their heirs or assigns, according to the smallest Government subdivisions. And all right, title and interest of the said railroad grantee or its successor in interest in and to any of such tracts, which the said railroad grantee or its successor in interest may relinquish hereunder shall revert to the United States, and such tracts shall be treated, under the laws thereof in the same manner as if no rights thereto had ever vested in the said railroad grantee, and all qualified persons who have occupied and may be on said lands as herein provided, or who have purchased said lands in good faith as aforesaid, their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said*

grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company or its lawful successor in interest may proceed to select, in the manner hereinbefore provided, lands in lieu of those relinquished, and patents shall issue therefor; Provided, further, that the railroad grantee or its successor in interest shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron or coal.

The meaning and scope of the Act of July 1, 1898, is discussed at length in the case of *Humbird v. Avery*, 195 U. S., 480, 499, where the court, speaking through Mr. Justice Harlan, says:

“Obviously, the first inquiry should be as to the object and scope of the Act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation, as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers—both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the Land Department, and it be-

came the duty of the Government to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was, therefore, as the Circuit Court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands would become vexatious, extending over many years and causing great embarrassment. In the light of that situation Congress passed the Act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned—the Government, the railroad grantee, and individual claimants.”

The Supreme Court in this case held that the Act applied to lands which had been patented to the Railroad Company prior to the Act of 1898, as well as to unpatented lands claimed by the Railroad Company, and that the vested rights of the Railroad by reason of the patent to said lands was not such as would enable it to alienate or in any way dispose of its right, title and interest to the same before the Secretary of the Interior had filed his listing of selections made as provided in the Act; that the list of selections made under the Act by the Secretary were absolutely binding upon the Railroad Company and the lands so listed must be surrendered by it upon such listing. The court further said that the Railroad Company promptly accepted the Act of 1898, and is therefore absolutely bound by its provisions. (In the statement of the case at page 488 the date of acceptance is given as July 13, 1898.)

See also *Hutchison v. N. P. Ry. Co.*, 43 L. D. 563.

Assistant Secretary Pierce of the Interior Department in the case of *Northern Pacific Railroad Company v. Huston*, 36 L. D. 283, in commenting upon the purpose of the Act, states:

“Congress intended an adjustment of conflicting claims. Adjustment implies an equitable settlement and precludes the idea of unfair dealing or the taking of undue advantage by either of the parties thereto. When the object of the statute is plain every rule of construction requires that it be so interpreted and administered as to carry out such object, if this can be accomplished without doing violence to the language used.”

Thus it appears that the purpose of the Act was to adjust matters as they stood at the time of its passage. After its passage and its acceptance by the Railroad Company, the Company put it out of its power to successfully assert a superior right to the land in dispute against an individual claimant, whatever it might have done prior to that time. In the said case of the *Northern Pacific Railroad Company v. Huston*, *supra*, Secretary further holds:

“The individual claimant by the terms of the Act became entitled to retain or relinquish his disputed claim. The first step in the plan of adjustment must be taken by him. The act placed

in his hands the right of election and the exercise of that right the railway company could not defeat. The railway company having voluntarily lodged this power in the individual applicant, it can hardly be said that it was thereafter asserting a superior right to the land. Its right was wholly dependent upon the election of the individual claimant. Congress certainly never intended that the right of the railway company should be further impaired by permitting the individual claimant to defer his election until he had destroyed the value of the land and then relinquish a barren claim."

In the case of *Humbird v. Avery*, *supra*, the court at page 506 states:

"We agree with the Circuit Court that the Act gives the option to keep or relinquish the disputed land to the individual claimant in every instance. If he elects to retain that land, it is to be listed by the Secretary in lists to be furnished to the railroad claimant, who must relinquish, and whose consent to this was given by the acceptance of the act."

#### STANLEY AT THE TIME OF THE CONVERSION OF THE TIMBER ELECTED TO RETAIN THE LAND.

It follows from this statement that if the claimant Stanley had determined what course he would pursue there was a mere ministerial duty devolving upon the

Secretary of the Interior, to-wit, the duty of listing the land for relinquishment by the Railroad Company. The Company on the other hand had only to quitclaim the land listed, for by the acceptance of the Act it had agreed to transfer to the United States whatever lands were contained in the list. We contend that this selection on the part of the claimant, who in this case was Stanley, was made at the latest in the year 1900 when he first cut the timber, the subject of the controversy in this action, for thus he put it out of his power to turn the land back to the Railroad Company in the condition it was in at the time of the passage of the Act of July 1, 1898. We quote further from the Secretary's decision in the Northern Pacific Railroad Company v. Huston, *supra*, in support of this contention:

"It is true the individual claimant is entitled to notice of his right to retain or relinquish his claim to the land in dispute. It does not follow, however, that prior to the receipt of such notice he may not by his own act estop himself from exercising his option. An election may be made as well by an act *in pais* as by formal declaration. The Department has recognized this principle by requiring election to be made within a certain time after the notice and treating a failure to act within that time as an election to retain the land. Should the claimant after the passage of the act perform other acts indicating a clear intention to retain the land, he might thereafter be estopped from asserting the contrary. The commission of waste upon the land might be well

treated as an act of election when it occasions a substantial detriment to the estate. The use or destruction of timber standing upon the land at the time the claimant became entitled to relinquish or retain the land is certainly strong evidence of his intention to exercise the latter right. If not evidence of that, it could be only evidence of unfair dealing, and this the spirit of the act upon which his alternative right depends does not sanction. The failure of the railway company, even if it had the power to do so, to prevent the performance of such acts would not operate to defeat the estoppel arising therefrom. Ignorance of his rights under the statute is equally immaterial. In the opinion of the Department, all persons entitled to an election under the act of July 1, 1898, who after its passage have placed it beyond their power to return the land to the railway company in substantially the same condition as at the date of the act, should be held to have elected to retain it."

It therefore follows from the holding of the Secretary of the Interior that at the very moment Stanley commenced to denude the land of its timber he then and there elected to retain the land, and the subsequent listing by the Secretary and the quitclaiming of the land by the company were mere ministerial acts preparatory to patenting to him the land he had so elected to retain. It will be noted that when Stanley made his application on January 28, 1908, he claimed settlement from the year 1891, and that at the time he cut the timber he

was on the land as a homesteader with the presumed intent at that time of acquiring title to the land from the United States. He therefore was one of the claimants or settlers in contemplation of whose rights the act was passed.

The case of *Humbird v. Avery*, *supra*, answers many of the questions confronting us here and its whole reasoning is persuasive of the attitude of the Government in this suit. In that case the company, after the passage of the act of July 1, 1898, and its acceptance thereof attempted to transfer some of the land in dispute. The court said:

“The contention of the plaintiffs, stated more fully, is in effect that it was competent for the company, notwithstanding its acceptance of the act, to take out of its operation any lands embraced by its terms, by simply selling or contracting to sell them before the delivery to it or to its successor in interest of the lists above mentioned. In other words — for the contention comes to that—the railroad company, so far as the act of 1898 was concerned, could, notwithstanding the acceptance of its provisions and on the day after such acceptance, have sold or contracted to sell its rights, title and interest in and to all the lands embraced by those provisions. This would have left no lands whatever to which the act could apply. Such a result would have left unsettled all the disputes relating to any lands which the company chose, in its own inter-

est, to sell while the land department was proceeding under the statute. We do not believe that Congress intended that it should be in the power of the railroad company in any such mode to defeat the operation of the act. Congress, manifestly, had reference to the situation as it was when the act of 1898 was passed.”

Now, if the Railroad Company could not, after the acceptance of the act, sell the land, it follows with equal force that they could not destroy the value of the land by disposing of the timber thereon. Consequently the Railroad Company could not have cut or allowed to be cut the timber in question, and if they did so, any money received therefor would have to be turned back to the real party in interest.

#### AN INCHOATE TITLE TO LAND IS SUFFICIENT TO SUPPORT AN ACTION IN TROVER FOR TIMBER CUT THEREFROM.

As an illustration of this principle, we call the court's attention to a case recently decided by the Supreme Court, *Knapp v. Alexander Co.*, 237 U. S. 162. This is an action to recover damages for timber cut and removed from plaintiff's land and converted into lumber by the defendant. The facts in the case are: That on February 20, 1902, Knapp made homestead entry of a certain quarter section of land; on February 26, 1902, he filed a non-saline affidavit; on April 5, 1902, Knapp went upon the land temporarily and forbade the agents of the Alexander Company to cut any timber from the land upon which he had filed. On July 1, 1902, Knapp

established actual residence on the land; on August 5, 1907, Knapp made final proof, and on January 22, 1908, he received patent to his claim. Between March 20 and April 7, 1902, the timber which was the subject matter of this suit was cut and removed from the land embraced in his entry. The court discussed the findings of the lower court in the following words:

“The Supreme Court (of Wisconsin) held that since at the time of the cutting the plaintiff was not in actual possession of the land, his right of action, as in trespass *quare clausum fregit*, must depend upon constructive possession, to be established by showing a good title; that notwithstanding plaintiff's homestead entry, there was, for timber cutting prior to the time of his actual entry into possession of the land, only a single right of action, and this was for the benefit of the United States as legal owner, to the exclusion of the entryman; and that, consequently, the settlement between defendant and the Government was a complete defense to plaintiff's action. The court seems to have regarded the entryman, prior to the taking of actual possession, as having no more than a color of title, and, while recognizing that the equitable doctrine of relation is applicable also to proceedings at law, held that this had no effect as against the claim of the United States, and when this was satisfied all claim for damages by reason of the timber cutting became extinguished, and the issuance of a patent could not revive it.”

The court then goes on to discuss the real interest the homesteader has in the land filed on by him from the time of filing to the time he received patent therefor, and also the effect of the patent when issued when considered in the light of the doctrine of relation.

“Laying aside for the moment the effect of the settlement, it is, we think, erroneous to regard the entryman’s interest prior to actual possession as being nothing more than a color of title. From the making of his entry the homesteader has the right of possession as against trespassers and all others except the United States; he has also *an inchoate title*, subject to be defeated only by failure on his part to comply with the requirements of the homestead law as to settlement and cultivation. So long as he complies with these laws in the course of earning a complete right to the lands as against the Government he has a substantial inceptive title, sufficient as against third parties to support suits in equity or at law. *United States v. Buchanan*, 232 U. S. 72, 76, 77; *Gauthier v. Morrison*, 232 U. S. 452, 460-462; and cases cited.

“The homesteader has a preferential right to the land, and in order to give effect to this according to the spirit of the laws, it must be and is held that when he has fulfilled the conditions imposed upon him and receives a patent vesting in him the complete legal title, this title relates back to the date of the initiatory act, so as to cut

off intervening claimants. *Shepley v. Cowan*, 91 U. S. 330, 337, 338; *United States v. Anderson*, 194 U. S. 394, 398; and other cases cited. In *Gibson v. Chouteau*, 13 Wall. 92, 100, the court, by Mr. Justice Field, said: 'By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceedings which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had.' "

*Peyton v. Desmond*, 129 Fed. 1, which is cited in the *Knapp v. Alexander Co.* case, *supra*, is another interesting case on this question of the sufficiency of an inchoate title to maintain trover. This case was decided by the Circuit Court of Appeals for the Eighth Circuit, opinion by Judge Vandevanter. The facts in the case are that Desmond made homestead settlement in 1890 for certain tract of land and received patent therefor on May 16, 1898. Certain timber was cut from this land during the years 1893 and 1894. It appears that Desmond and one Judd settled on the land at about the same time, each claiming to be a prior settler. Judd's application being presented first at the Land Office, was allowed, and Desmond's application rejected. A contest ensued between Desmond and Judd, which was decided in favor of Judd. On July 17, 1893, Judd com-

muted his entry and obtained a certificate of title but no patent. A further contest was had between the parties, which resulted in a decision in favor of Desmond. On October 11, 1893, Judd conveyed his interest in the land in question to one Peyton, who, during the contest proceedings, cut the timber from the land. The question arising in this case was: Can the plaintiff maintain trover for timber cut from land embraced in his homestead but the legal title to which is in the United States? Does the plaintiff's title under the patent issued May 16, 1898, upon his homestead entry relate back to a time anterior to the cutting of the timber by the defendants in the winter of 1893 and 1894 and entitle him to maintain this action?

“From what has been said, it is clear that the defendants are liable to the plaintiff or to the United States for the conversion of the timber, and that their only lawful concern is that they be made to respond only to the rightful claimant. Their liability is as certain as if the cutting had been a wilful trespass, and the measure of the damages for the conversion is the same, whether the right of recovery is in the plaintiff or in the United States. We therefore return to the question whether the plaintiff's title under the patent relates back to a time anterior to the cutting of the timber, and entitles him to recover for its conversion. \* \* \* \* \* While the doctrine of relation is of equitable origin, it has a well recognized application to proceedings at law. By it is meant that principle by which an act done at

ing and improving said land, and said land from which said timber was so cut and removed as aforesaid has never been cleared, cultivated or improved and was not intended to be cleared, cultivated or improved by the said William N. Stanley.

## V.

That in the fall of the year 1901 and in the spring of the year 1902, the said William N. Stanley and George Charlie and Joe Wilmot, well knowing that said above described land was public land of the United States, did wrongfully and unlawfully cut and remove from said land, hereinabove fully described, 100,000 feet of red fir timber then standing and growing thereon and placed the same in the Lewis River in the State of Washington at what is known as the forks of said river; that upon placing said timber in said river, the said William N. Stanley, George Charlie and Joe Wilmot thereupon formed the same into rafts in said river; that when said logs were so placed in said rafts in said river as aforesaid, they were of the reasonable value of five dollars per thousand feet; that thereupon during the spring of the year 1902, the said William N. Stanley, George Charlie and Joe Wilmot wrongfully and unlawfully sold said timber in the said rafts, as aforesaid, to the defendant Inman-Poulsen Lumber Company, and thereafter delivered the same to the said Inman-Poulsen Lumber Company in said rafts in the forks of said river to the amount of 100,000 feet of red fir timber.

That in the fall of the year 1902 and in the spring of the year 1903, the said William N. Stanley and R. A. McLary, the latter now deceased, well knowing the said above described land was public land of the United States, did wrongfully and unlawfully cut and remove from said land 1,000,000 feet of red fir timber then and there standing and growing thereon, and place the same in Lewis river in the state of Washington at what is known as the forks of said river; that upon placing said lumber in said river, said William N. Stanley and R. A. McLary thereupon formed the same into rafts in the said river; that when the said lumber was so placed in said rafts in said river as aforesaid it was of the reasonable value of five dollars per thousand feet; that thereupon during the spring of the year 1903, the said William N. Stanley and R. A. McLary wrongfully and unlawfully sold the said lumber in the said rafts to the said defendant Inman-Poulsen Lumber Company, and thereafter delivered the same to the said Inman-Poulsen Lumber Company in the said rafts at the forks of said Lewis River to the amount of one million feet of red fir timber.

That the said timber so cut, removed and sold as aforesaid, by the said William N. Stanley, George Charlie, Joe Wilmot and R. A. McLary, aforesaid, at and during the time aforesaid, was so cut, removed and sold without the knowledge, consent or permission of the said Northern Pacific Railroad Company, or its successors or assigns in interest, and without the knowledge, consent or permission of the United States of America.

perfecting his homestead claim, to receive a conveyance of the land in the condition in which it was when his claim was initiated. The defendants made that impossible. When the patent was issued, the timber was gone. In its stead there existed a right of action for its conversion. Does not the promotion of justice—the due protection of the plaintiff's rights—require that his patent be held to relate to the date of his initiatory act, and thereby invest him with that which now takes the place of the timber? We think it does. \* \* \*

It does not comport with the spirit of the homestead law to say that, after the initiation and partial perfection of the homestead claim, some third person may rob the land of a substantial part of that which gives it value, and that, on full compliance with the law by the homestead claimant, the Government may convey to him that which is left of the land, and may recover from the wrongdoer, and retain to its own use, the value of that which has been unlawfully taken from the land through no fault or wrongful act of the homestead claimant. The law does not contemplate anything so unreasonable. The principles underlying and supporting the doctrine of relation are such that it may be as readily invoked to remedy or correct a loss such as is here disclosed, occurring while the claim was being perfected, as to prevent the loss of the entire right or title through an intervening claim. The plaintiff's title under the patent relates back to a time prior to the sever-

ance and conversion of the timber by the defendants, which was after the initiation of his claim, and entitles him to maintain this action.”

We earnestly contend to the court that in view of the construction given by the Supreme Court to the Act of July 1, 1898, *Humbird v. Avery*, *supra*, the appellant here, at the time of the cutting of the timber from the land in question by Stanley, had such an inchoate title as would enable it now to maintain an action in trover for the value of the timber cut.

The *Knapp v. Alexander Co.* case, *supra*, directly supports our contention. In that case the plaintiff at the time the timber was cut had no title to the land upon which the timber grew, nor was he then in possession. At that time he had only filed his homestead entry, to which he obtained patent long afterwards. Yet the court held that the title given him by his patent related back to the inception of his entry, and at the time of the cutting of the timber he had an inchoate title which would enable him to maintain his action for the value of the timber, even though he was not in possession at the time of the cutting. The initial entry made by him gave him an absolute right under the law to obtain a patent provided he conformed to the requirements of the law with respect to residence and cultivation.

In the case at bar the Act of July 1, 1898, accepted by the Railroad Company, was in effect an agreement between the Railroad Company and the United States, made to settle previous disputes between settlers under Federal laws and the Railroad Company, both claiming

title to various lands included within the railroad limits under the grant of 1864. By this agreement the railroad absolutely bound itself to surrender the lands listed for relinquishment by the Secretary of the Interior. It had no right to dispose of any of these lands pending the action of the Secretary in carrying out the terms of the Act of 1898, and therefore could not dispose of the timber on the lands or exercise acts of ownership thereover. The Act really settled the disputes between the settlers and the railroad company as they existed on January 1, 1898. The rights of the disputing parties were settled and adjusted as of that date. The Secretary's duty then, in listing the lands for relinquishment, was not to adjust or declare any new rights of claimants under the United States arising since the passage of the Act; but the listing by him of the lands for relinquishment, the relinquishment thereof by the railroad company, their making of a quitclaim deed and the acceptance thereof by the Government, were merely steps toward the completion of a title provided for, settled and agreed upon by the Act of July 1, 1898, itself, as of date January 1, 1898. It must necessarily follow then, that the United States held an inchoate title, for the benefits of the settlers, from the date of the Act until title was perfected to those lands which were to be relinquished by the railroad company under the terms of the Act. By application of the doctrine of relation, as in the *Knapp v. Alexander* case, the title of the Government to the land relinquished would relate back to the date of the initiatory adjustment of the respective rights of the railroad company and settlers holding under the

United States, that is, July 1, 1898. We think the conclusion is irresistible, from the very wording of the act itself, that it was the intention of Congress that title when obtained by the Government should relate back to the date of the Act, and that the right of the Government to such title had its inception from such date.

As alleged in the complaint, at the time of the cutting of the timber from the land in question by Stanley, he was occupying the land as an actual bona fide settler under the United States and was claiming, as is shown by his subsequent filing, as such settler by virtue of residence and settlement from the year 1891. We contend that the facts alleged in the complaint sufficiently show that the land in question in this action was a part of the lands which the railroad company had agreed to relinquish by virtue of their acceptance of the Act of 1898, and, therefore, the United States had an inchoate title to the land at the time of the cutting and conversion of the timber thereon. Having such inchoate title the United States could recover from Stanley, the trespasser, or from the appellee herein who purchased the timber from him.

Knapp v. Alexander Co. (*supra*).

Woodenware Co. v. U. S. (*supra*).

Counsel for appellee in the lower court placed great reliance upon the case of *U. S. v. Loughry*, 172 U. S. 206 as supporting their contention that the appellant has no cause of action, and it is presumed that they will rely strongly upon that case here. This was an action in trover for the recovery of damages for certain timber

cut by the defendant. The timber was cut from land granted by the United States to the State of Michigan to aid in the construction of a railroad. By the provisions of the grant if the railroad was not built the unsold lands were to revert to the United States. The railroad was not built at all. The grant was construed by the court to be a grant in praesenti with a condition subsequent. A forfeiture of the grant was declared by Congress but not until subsequent to the cutting of the timber in question. The court held that to entitle the plaintiff to recover in the action, which was substantially in trover, it was necessary to show a general or special property in the timber cut and a right of possession of the same at the time of the commencement of the suit. We quote from the decision at page 211:

“It follows that the United States, having no title to the lands at the time of the trespass and no right to the possession of the timber, are in no position to maintain this suit.”

And further, at page 219, the Court says:

“They (the Government) had no right to the possession of the land until Congress passed the Act of March 2, 1889, forfeiting the grant. Up to that time the title was in the state, and until then the United States had no more right to enter and take possession than they would have to take possession of the property of a private individual.”

This case is clearly distinguishable from the one at bar where at the time of the trespass the railroad company was not in possession, but the land was occupied by Stanley as a bona fide settler under the United States land laws with the presumed intention of obtaining the title from the United States, and the railroad company, prior to the trespass, by its consent to the Act of July 1, 1898, had confirmed the validity of Stanley's possession under the Government and his rights to obtain title from the Government.

The court in the Loughry case, above cited at pages 218 and 219, discussed several cases wherein the doctrine of relation was applied relating title back to its inception, so as to enable the plaintiff to recover in trover for timber severed from lands to which title was obtained subsequent to trespass. Commenting on these cases, the Court said:

“These cases are distinguishable from the one under consideration in the fact that the plaintiffs had an inchoate title to the lands—a title which no one could disturb, and which the state was bound to perfect by the issue of a patent, provided the plaintiffs followed up their application. We do not think the doctrine of these cases ought to be extended.”

We submit that this part of the Court's opinion clearly shows that the Loughry case is not applicable in principle to the facts in the case at bar, which plainly comes within the distinction made. At the time of the trespass in the case here the United States had an inchoate title to

the land trespassed upon, which the railroad company could not disturb, and which the said company was bound to perfect by relinquishment and deed, provided the United States followed up its rights under the Act of 1898 and listed the land for relinquishment.

We take it as fundamental that where there is a wrong there is a remedy, that procedure is not an end in itself, but only the means to an end, that is, the administration of justice according to law. According to the allegations of the complaint this timber was cut wrongfully by Stanley and others, they having no title to it, and sold to the appellee herein. This wrong should not be without redress. Some one is entitled to recover the value of this timber. The United States and the railroad company were the only parties in interest. The railroad company, although it held the legal title to the land at the time of the trespass, was not damaged, for it, upon relinquishment of the land, received other land in lieu thereof. Even before it did relinquish it could not have recovered from Stanley for the trespass because he was holding under the United States and was one of the settlers whose rights were adjusted by the Act of 1898. The railroad company upon relinquishing the land was of course bound to return it to the Government intact without a large portion of its value, the timber, denuded from it. Even if the company could have recovered for the trespass it would be accountable to the United States for the amount so had and received. The United States having taken back the land from the railroad company, by virtue of the Act of 1898, minus the timber thereon, a considerable portion of its value, is the real

party suffering the damage. The doctrine of relations is a fiction of law adopted solely for the purposes of justice, and by it one who equitably should be so entitled is enabled to assert a remedy for an injury suffered which otherwise should go unredressed. *Gibson v. Chouteau*, 13 Wall. 92, at 100. The case at bar, we think, clearly calls for the application of the doctrine of relation, as above urged, to redress the wrong suffered by this appellant.

Upon the whole record, it is respectfully submitted that the judgment of the district court should be reversed with direction to overrule the demurrer to the amended complaint.

Respectfully submitted,

CLARENCE L. REAMES,  
United States Attorney for Oregon.

JOHN J. BECKMAN,  
Assistant United States Attorney for Oregon.  
Attorneys for Plaintiff in Error.



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,  
Plaintiff in Error.

vs.

INMAN, POULSEN LUMBER COMPANY,  
a corporation,  
Defendant in Error.

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**BRIEF OF DEFENDANT IN ERROR**

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Upon Writ of Error to the District Court of the United  
States for the District of Oregon.

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Clarence L. Reames, United States Attorney for Oregon, and John J. Beckman, Assistant United States Attorney, both of Portland, Oregon, Attorneys for Plaintiff in Error.

Cake & Cake, of Portland, Oregon, Attorneys for Defendant in Error.

Filed



Number 2687.

*In the United States Circuit Court of Appeals for the  
Ninth Circuit.*

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UNITED STATES OF AMERICA,  
Plaintiff in Error.

vs.

INMAN, POULSEN LUMBER COMPANY,  
\*a corporation,  
Defendant in Error.

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## BRIEF OF DEFENDANT IN ERROR

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Upon Writ of Error to the District Court of the United  
States for the District of Oregon.

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### STATEMENT.

This is an action to recover the value of timber alleged to have been cut from government land by one Stanley and purchased by the defendant. It is from an order sustaining a demurrer to the sufficiency of the complaint that this appeal is taken.

The complaint alleges that by an Act of Congress approved July 2, 1864, the land from which the timber in question was cut became vested in the Northern Pacific Railroad Company by reason of the definite location of its railroad opposite the said land on September 22, 1882, and the subsequent issuance of a patent thereto. That thereafter and on July 1, 1898, Congress passed an Act providing for a relin-

quishment by the Railroad Company to the United States of certain lands within the grant of 1864, which had been disposed of by the Government or were occupied by settlers prior to January 1, 1898, and other lands taken in place thereof; that an acceptance of the provisions of the Act was thereafter filed by the Railroad Company, and that in compliance with the Act the Railroad Company relinquished the land in question after the Secretary of Interior had furnished the Railroad Company with a list of lands for relinquishment, which list was made May 2, 1905, by executing and delivering to the Government a quitclaim deed, which deed was dated the 5th of August, 1907, and accepted by the Government January 3, 1908.

The complaint then alleges that by reason of the acceptance of the said Act of July 1, 1898, by the Railroad Company, the title to the said land became vested in the Government as of date July 1, 1898, and that thereafter the same was public land of the United States; that on January 28, 1908, the homestead application of William N. Stanley was allowed by the Land Office for the said land by virtue of a claim of settlement of the said Stanley as an actual bona fide settler from and after the year 1891; that during the time the said Stanley claimed to occupy the said land as a bona fide settler, to-wit, during the years 1900, 1901, 1902 and 1903, the said Stanley and others wrongfully and unlawfully cut and removed from the said lands large quantities of timber for sale and speculation and not in the course of clearing and improving said land; that the said timber was cut and removed and sold to the Inman, Poulsen Lumber Company without the knowledge or consent of the Northern Pacific Railroad Company, or its

successors or assigns in interest, and without the knowledge or consent of the United States.

### ARGUMENT.

This is an action in trover, and before the plaintiff in error can recover, it must show general or special property in the timber cut and its right to the possession thereof at the time of the bringing of the action. (*United States v. Loughrey*, 172 U. S. 206.) Not only does the complaint fail to show such property and right of possession, but it affirmatively appears therefrom that such property and right of possession was in the Northern Pacific Railroad Company.

The title to the land became vested absolutely in the Northern Pacific Railroad Company under the grant of 1864, immediately upon the location of the railroad of the said Company, and the filing of the map of the location thereof made the title and ownership of said land a matter of public record. This occurred in September, 1882. In addition to this a patent issued to the Northern Pacific Railroad Company in May, 1895. The land in question being within the place limits of the grant, the said grant was a grant in praesenti and upon the filing of the map showing the location of the Company's railroad, title thereto became vested as of the date of the grant. (*United States v. Loughrey*, 172 U. S. 206; *Schulenberg v. Harriman*, 21 Wall. 44).

The title to the land having become vested in the Northern Pacific Railroad Company, was this title ever divested and revested in the Government so as to give the Government the right to maintain this

action? It is the Government's contention that the interest of the Railroad Company in this land immediately terminated and became vested in the United States upon the acceptancy by the Railroad Company of the Act of July 1, 1898. This Act was passed for the purpose of settling disputes arising out of conflicting rulings of the Land Department in reference to the Eastern terminus of the Railroad, and provides substantially as follows:

That where prior to the 1st day of January, 1898, land of the Northern Pacific Railroad Company secured under any Government grant "has been purchased directly from the United States or *settled upon or claimed in good faith* by any qualified settler under color of title or claim of right under any law of the United States, or any ruling of the Interior Department, and where the purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest shall be entitled to select in lieu of the land relinquished an equal quantity of public lands . . . ."

The Act makes it the duty of the Secretary of the Interior to ascertain from time to time and cause to be delivered to the Railroad Company as soon as conveniently may be done, a list of lands which have been settled or occupied by bona fide settlers. "And all right, title and interest of the said Railroad grantee, or its successors in interest, in and to any of such tracts, which the said Railroad grantee, or its successors in interest, may relinquish hereunder, shall revert to the United States, and such tracts shall be treated under the laws thereof in the same manner as if no rights thereto had ever vested in the said Railroad grantee, and all qualified persons who have

occupied and may be on said lands as herein provided, or who may have purchased said lands in good faith as aforesaid, their heirs and assigns, shall be permitted to prove their title to said lands, according to law, as if said grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company, or its lawful successor in interest, may proceed to select; in the manner herein provided, lands in lieu of those relinquished, and patents shall issue therefor."

This Act, together with the acceptance of the provisions thereof by the Railroad Company did not of itself operate to divest the Company of the title to the land in question; first, because the said Act does not apply to the case at bar, as Stanley was not a settler in good faith; second, because certain executive action was necessary before the Act could be put into operation, namely, the preparation and delivery to the Railroad Company a list of lands to be relinquished by it.

FIRST: Irrespective of the effect of the Act in some cases, it has no application here, since the land in question does not come within the provisions thereof. The Act clearly provides that the Railroad Company may relinquish lands to the Government where these lands have been "settled upon or claimed in good faith by any qualified settler under color of title or claim of right." What constitutes good faith within the meaning of the Act?

In the first place, good faith implies lack of notice of a prior right. A homesteader is not a settler or claimant in good faith who knows that the land claimed is owned by another than the Government. The

record title is constructive notice of such ownership and actual notice is not necessary. (*Walden v. Knevals*, 114 U. S. 373.) The record showed title in the Railroad Company upon filing the map of the definite location of the Railroad which occurred nine years before the alleged bona fide settlement of Stanley. At that time there was a complete record title in the Railroad Company, which was notice to all the world. Under such circumstances there could be no bona fide purchase from the Government or settlement under the homestead laws.

As a further illustration of the importance of the state of the record title to the said lands at the time of the alleged trespass, it is well to bear in mind not only that the existence of this record was constructive notice to the settler, but was also notice to the defendant in error that the land and timber was not public property.

The purpose of the Act of 1898 is set forth with considerable minuteness in the case of *Humbird v. Avery*, 195 U. S. 506. It appears that some controversy arose as to the eastern terminus of the Northern Pacific Railroad. The Company claimed Ashland to be that terminus and the Secretary of the Interior so ruled. Later the Secretary changed his ruling and held Duluth, not Ashland, to be the terminus, and that, therefore, the grant of 1864 did not embrace any lands between these two cities. The Company's selections within the indemnity limits between these cities were cancelled by the Secretary and the lands thrown open to sale and entry by the United States. Relying upon this ruling, certain persons filed upon certain of the lands between Duluth and Ashland which, under the former ruling of the Secretary would

have been within the indemnity limits of the Railroad grant. These settlers acting in good faith had gone upon the land to settle them and the controversy which arose between the Government, the Railroad Company and the settlers resulted in the Act of 1898. Shortly before the passage of this Act, the Supreme Court of Wisconsin held contrary to the ruling of the Secretary of the Interior, which decision was affirmed by the United States Supreme Court, that Ashland and not Duluth was the Eastern terminus of the Northern Pacific Railroad. In this case the Act of 1898 was held to apply. We have gone into this detailed statement of the conditions that led up to the passage of this law and the reasons therefor to show that the words "good faith" therein used were for a purpose, and that these words should be construed in the light of the purpose of the legislation.

In the case we have just referred to the settler had a right to rely upon the ruling of the Interior Department, and he made his settlement in view of this ruling and as no title to the land had ever been vested in the Northern Pacific Railroad Company, he was held to be a bona fide settler. What a vast difference between that case and the one at bar! In one case there was a substantial dispute between the claimants for which the Act was intended to provide a means of settlement. In the case at bar there was and could be no question of the validity of the relative claims of the Railroad Company and Stanley. The latter acquired no right under his alleged settlement on the land since he did not make that settlement in the belief that the land was public domain, but with the knowledge that it was the property of the Railroad Company. Stanley was a mere trespasser

Further to the effect that the "good faith" of the settler is a condition precedent to the application of the statute, we quote from *Humbird v. Avery*, page 506:

" \* \* \* The statute embraces both patented and unpatented lands, in respect of which the Railroad company or its successor in interest claims that a right thereto attached by the definite location of its road or by selection; *provided, they are also such lands as were originally purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title.* \* \* \* "

The Department of the Interior recognized the importance of the bona fides of the settlement of the homesteader, to make the Act operative, as shown by an opinion of Acting Secretary Ryan, dated July 20, 1906, 35 L. D. 49, wherein he said:

"It is the opinion of this Department that the question as to whether the title to the lands involved can be fairly considered as being 'in dispute' at the date of the passage of the Act and at the time the individual claim must have been initiated, to-wit, January 1, 1898, determines the applicability of the Act of July 1, 1898, rather than the basis of the Railway Company's claim."

In this connection it is well to note the statement of counsel for the appellant that the Court in the *Humbird v. Avery* case held that the Act applied to lands which had been patented prior to its passage as well as to unpatented lands *claimed by the Railroad Company* and that the vested rights of the Railroad

Company by reason of the patent would not enable it to alienate or in any way dispose of its right before the Secretary of the Interior had filed his list of selection under the Act. The facts and language of the case do not justify any such conclusion. Patents had been issued to certain of the lands in dispute to the individual "settlers or purchasers" and the Act was held to apply to these lands notwithstanding patent had issued. As to the Railroad Company, no patent had ever issued. The selections which it had made were not even approved by the Secretary of the Interior.

Nor can it be successfully maintained that the furnishing of a list of lands to be relinquished by the Secretary of the Interior was conclusive upon the Railroad Company as to the good faith of the settler. Section 3 of the Act provides that the list of lands to be relinquished by the Secretary of the Interior shall be "conclusive with respect to the particular lands to be relinquished." This language should be construed to refer to lands to be relinquished which had been settled in good faith. Attention is especially called to the fact that the list furnished by the Secretary of the Interior is not to be conclusive on the Railroad Company with respect to the bona fides of the settlement. The good faith of the homesteader is referred to many times in the Act and it is therefore clear that the bona fides of the settlement is the very basis upon which disputes were to be settled, and a condition precedent to the conclusiveness of the listings for relinquishment by the Secretary of the Interior. If the Act of 1898 could not apply to the land in question, because of the lack of good faith on the part of Stanley, then the acceptance of its provisions by the Railroad Company could not possibly operate to

divest the Company of its title to the said land, or its right to the timber growing thereon.

SECOND: Assuming, however, that the Act is applicable and that the action of the Secretary of the Interior is conclusive as to the bona fides of the settlement of Stanley, yet the mere passage of the Act and the acceptance thereof by the Railroad Company did not of itself operate to divest the Company of its title and revest the same or the right of possession in the United States. Certain action on the part of the Secretary of the Interior in listing the property which had been settled was necessary before the Company could be required to relinquish. The complaint shows that the land in question was not listed by the Secretary of the Interior for relinquishment under the Act until May, 1905, seven years after the passage of the Act, and more than a year after the last timber was cut, and it was not until August, 1907, that the Railroad Company executed its quitclaim deed to the land in favor of the Government.

Since the Railroad Company had the absolute title to the land and the right of immediate possession thereof at the time the timber was cut, it alone, or one to whom the right had been duly assigned, could maintain an action for the cutting. The complaint does not allege that the right of action of the Railroad Company for the removal of the timber was ever assigned to the United States.

The principle here involved was clearly announced in the case of the *United States v. Loughrey*, 172 U. S. 206. The facts in that case were very similar in many respects to the one at bar. It was an action by the United States to recover the value of timber

cut from land in Michigan. It was charged that the timber had been cut by one Sauve and sold to the defendant Loughrey. The land was within a grant to the State of Michigan made in 1856 to aid in the construction of a railroad within the state. It was provided in the granting Act that all lands then unsold should revert to the United States if the railroad was not completed within ten years. In 1889, one year after the timber was cut, Congress passed an Act forfeiting the lands in question on account of failure to complete the railroad within ten years. The court held as follows:

1—That the grant of Congress in conformity with the holding in *Schulenberg v. Harriman*, 21 Wall. 44, was a grant in praesenti of title to the odd sections to be afterwards located, and that upon the definite location of the railroad the title in the grantee became absolute.

2—That the United States having no title to the land and no right to the possession of the timber at the time of the trespass, could not maintain an action for the timber cut. In this connection the court says:

“The plaintiff is bound to prove a right of possession in himself *at the time of the conversion*, and if the goods are shown to be in the lawful possession of another by lease or similar contract, he cannot maintain trover for them.”

3—That a subsequent vesting of title in the Government did not give it the right of action for timber cut while the title and right of possession was in another. In this connection, the court said:

“Neither a deed of land nor an assignment of a patent for an invention carries with it a right of action for prior trespass or infringement. Such rights of action are, it is true, now assignable by the statutes of most of the states, but they only pass with the conveyance of the property itself where the language is clear and explicit to that effect.”

The application of this last mentioned principle to the case at bar is clear. It is not alleged in the complaint that the right of action of the Railroad Company, if it had one, was ever assigned to the Government, nor is it alleged that the relinquishment and deed of the Railroad Company attempted by the language used to pass this right. The right then is with the Company alone (*Schulenberg v. Harriman*, 21 Wall. 44).

Referring to the second holding of the court in the *Loughrey* case, to-wit, that the United States did not have the title or right of possession sufficient to maintain an action of trover, we quote (page 216):

“The fact is that nothing remained of the original title of the United States but the possibility of a reversion, a contingent remainder, which would be an insufficient basis for an action of trover.”

The application of this principle to the facts of the case at bar is evident. At the time that Stanley cut the timber, the United States had only a contingent interest in the land,—a reversionary interest which might or might not ripen into an absolute title and right of possession, the contingency being the action

of Stanley under the Act with reference to his right to retain his claim and the listing of the same by the Secretary of the Interior for relinquishment by the Railroad Company. This contingent or reversionary interest in the land did not affect the legal title in the Railroad Company, nor did it give the United States the possession or the right of possession of the land, and, as we have already seen, before an action of trover can be maintained, there must be title and the possession, or the right of possession, in the Government at the time of the trespass.

The right of possession did not pass until it was finally determined that the Railroad Company would be called upon to relinquish in favor of Stanley. This was determined only upon the election of Stanley to retain the land and the listing thereof by the Secretary of the Interior. Prior to that time the title and right of possession of the Railroad Company was absolute, and could only be defeated by the bona fide settlement of Stanley and his election to hold the land as a homestead. Prior to that time the United States had no more right to enter and take possession of the land than they would have to take possession of the property of a private individual.

There is nothing in the Act itself to give the United States a right of possession or the right to maintain an action for timber cut under the circumstances of this case. The following language cannot be construed to confer any such right:

“All right, title and interest (which the railroad grantee may relinquish) shall revert to the United States, and such tract shall be treated under the laws thereof in the same manner as

if no rights thereto had ever vested in the said railroad grantee."

The evident purpose of this language was to divest the Railroad Company of all title to any land coming under its operation as though no title had ever been in the Company, so that all bona fide settlers would have the same rights and the homestead laws would operate in the same manner as though the title had always been in the Government. If the above language were to be construed to confer upon the Government the right to maintain actions for trespass committed after the passage of the Act and before actual relinquishment, it must also be construed to apply to trespass committed before the passage of the Act, for if applying in one instance it is broad enough to apply in the other. Indeed, if the language is to be construed to apply to anything other than the mere naked title to the land and a strict construction is to be placed upon the words used "and such tract shall be treated in the same manner as if no rights thereto had ever vested in the railroad grantee," then the Railroad Company itself would be answerable for all timber which it may have cut from its own land prior to the passage of the Act. The error of such a construction is apparent from the absurd conclusions to which it leads.

The burden of the Government's contention is that title to the land having finally been perfected in the United States, that title by the law of relation became vested as of the date of the acceptance of the Act by the Railroad Company, and that such title carried with it the right to recover for timber cut between the time of the acceptance of said Act and the perfecting of said title.

Reliance is placed upon two cases, *Knapp v. Alexander Company*, 237 U. S. 162, and *Peyton v. Desmond*, 219 Fed. 1. It was here held that the title of a homesteader under our homestead laws after title had been perfected in him, related back as of the date of his filing, and that under these circumstances he had such inchoate title after his filing as to give him a right of action for timber cut between the time of his said entry and the granting of the patent. This principle has long been established and is based upon the theory that the one in possession, or the one having the right of possession, under our homestead laws may maintain an action in trover. The homesteader upon filing upon land, has the right to the immediate possession thereof. The right of possession at the time of the removal of the timber coupled with his subsequent acquisition of the title gives him this right of action.

These cases, however, widely differ from the case at bar, even though we assume that the law of relation applies. The initiatory act in this process whereby the title to the land in question was to become vested in the United States was the acceptance by the Railroad Company of the Act of 1898. This title was finally perfected by the giving of a deed. Did this initiatory act of itself vest in the United States the title, possession or the right of possession to the land in question? As between the Railroad Company and the Government, that right was with the former. The distinction between the cases cited by the appellant and the one at bar is clearly set forth by the court in the case of the *United States v. Loughrey*. After citing several cases similar to those cited by counsel where the law of relation applied, it was pointed out that there was some limitation upon the

application of the doctrine. On page 219, the court said:

“These actions are distinguishable from the one under consideration in the fact that the plaintiffs had an inchoate title to the land—a title which no one could disturb, and which the state was bound to perfect by the issue of a patent provided the plaintiffs followed up their application. We do not think the doctrine of these cases ought to be extended.”

However, let it be assumed for the sake of argument that the principle for which appellant contends does apply to this case so as to revest the title to the land as of the date of the acceptance of the Act. Yet it does not follow that the revesting of the title in the United States carries with it the right to maintain this action. Again we quote from the case of *United States v. Loughrey*, page 217:

“But conceding all that is contended for by the plaintiff with respect to the reconstitute of the title to the lands by this Act, it does not follow that the title to the timber which had been cut in the meantime was also revested in the United States. As was said in *Schulenberg v. Harriman*, the title to the timber remained in the state after it had been severed, but it remained in the state as a separate and independent piece of property, and if the state had elected to sell it, a good title would have thereby passed to the purchaser, notwithstanding the subsequent act of forfeiture. It did not remain the property of the state as a part of the land, but as a distinct piece of property, al-

though the state took its title thereto through and in consequence of its title to the lands. From the moment it was cut, the state was at liberty to deal with it as with any other piece of personal property."

Appellant places much reliance upon the case of *Humbrid v. Avery* as an authority upon the question of the right of the Railroad Company to convey lands which come under the purview of the Act of 1898 after the acceptance of its provisions by the Company. The court in that case did say that the Railroad Company should not be allowed to defeat the operation of the Act by deeding these lands after its acceptance by the Company. This case, however, differs from the one at bar in the following important particulars:

1—It was a suit in equity to have the plaintiff adjudged to be the owner in fee of the land in question, and referred only to the question of the title and did not decide the question of the right of possession thereof after the acceptance of the Act.

2—The conveyance was made the next day after the acceptance of the Act and before any opportunity was given to put the same into operation by the Secretary of the Interior. Under these circumstances the suit was held to be premature. (Page 510.)

3—The title to the land in question was never vested in the Railroad Company. The land was within the indemnity limits and selections within these limits had never been approved by the Secretary of the Interior. It has uniformly been held that as to lands within indemnity limits no title is acquired by

the grantee until the specific parcels have been selected by the grantee and approved by the Secretary of the Interior.

Wisconsin Central Railway Company v. Price Company, 133 U. S. 496.

Daniels v. Wagner, 205 Fed. 239.

Sjoli v. Drechel, 199 U. S. 565.

On this question, the court in Humbrid v. Avery said:

“This conclusion is fortified, if not absolutely demanded, by another consideration, namely, that no title to indemnity lands is vested until a selection be made by which they are definitely ascertained and the selection made approved by the Secretary of the Interior. This principle is firmly established. \* \* \* Now, the lands here in dispute and claimed by the plaintiffs as grantees of the Northern Pacific Railway Company (the alleged successor in interest of the Northern Pacific Railroad Company) are lands admittedly within indemnity as distinguished from granted or placed limits. The mere filing of lists of selections after the acceptance of the map of definite location of the railroad lands between Duluth and Ashland gave the company no such title as could be enforced by the courts in a suit between private parties. \* \* \* .”

For the reasons which we have just noted, the principle announced in the case of Humbrid v. Avery can hardly be considered applicable to the case at bar. In the former case, the Railroad Company

never did have the title or the right to possession of the land in question, and certainly could not convey any title to Humbird. It is important also to note that the Railroad Company attempted to convey this land by deed immediately after the acceptance of the Act by it without giving the Secretary of the Interior any opportunity to carry out the provisions of the Act. In the case at bar, seven years elapsed before the Secretary of the Interior took any action toward listing the land in question for relinquishment, and it would seem as an abstract question of justice and right where the rights of innocent third parties are involved that the United States should be estopped on account of its own laches from now maintaining this action.

This is an action in trover to recover the value of timber converted. This action can be maintained only by one who either had the title or the right of possession at the time of the conversion. The complaint in this case does not show that the title to the land in question, or the right to the possession thereof, was vested in the appellant at the time of the conversion, but rather does the complaint show that the fee simple title to the land was vested in the Northern Pacific Railroad Company subject to be defeated upon the happening of a contingency, and as between the Railroad Company and the Government the right of possession was in the former.

Further, the complaint fails to state a cause of action against this respondent for the reason that it appears therein that the Act of July 1st, 1898, has no application to the land in question from which the timber was cut for the reason that Stanley was not a

settler prior to January 1st, 1898, in good faith under color of title.

The respondent therefore respectfully submits that there was no error in the judgment of the District Court in sustaining respondent's demurrer to appellant's complaint.

Respectfully submitted,

CAKE & CAKE,  
Attorneys for Respondent in Error.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,  
Plaintiff in Error,

vs.

INMAN, POULSEN LUMBER COMPANY,  
a corporation,  
Defendant in Error.

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**SUPPLEMENTAL BRIEF OF DEFENDANT  
IN ERROR**

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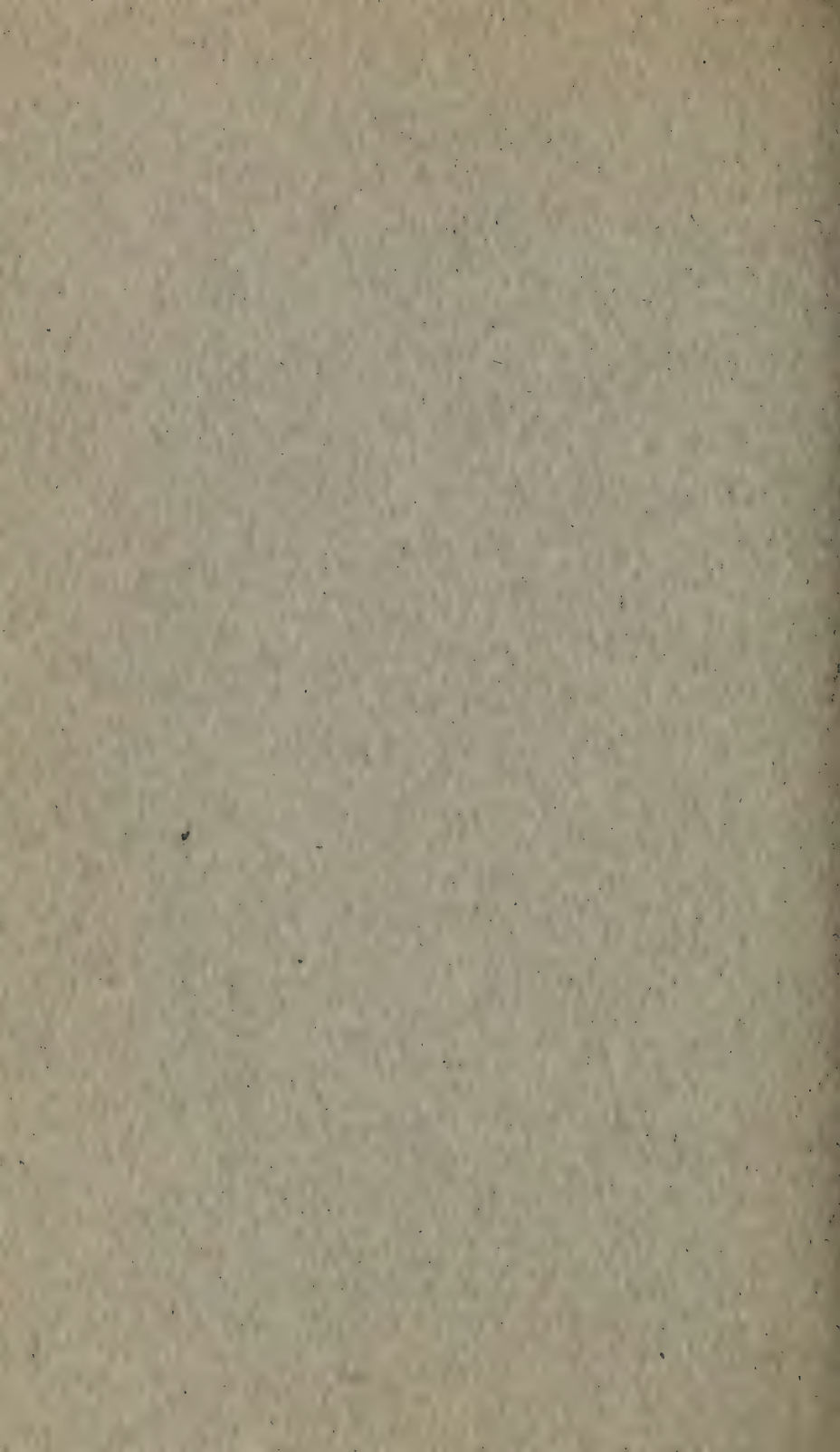
Upon Writ of Error to the District Court of the United  
States for the District of Oregon.

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Clarence L. Reames, United States Attorney for Ore-  
gon, and John J. Beckman, Assistant United States  
Attorney, both of Portland, Oregon, Attorneys for  
Plaintiff in Error.

Cake & Cake, of Portland, Oregon, Attorneys for  
Defendant in Error.

*[Faint red stamp: FILED, MAY 10 1900, U.S. DIST. CT. PORTLAND, ORE.]*



No. 2687

*In the United States Circuit Court of Appeals for the  
Ninth Circuit.*

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UNITED STATES OF AMERICA,  
Plaintiff in Error.

vs.

INMAN, POULSEN LUMBER COMPANY,  
a corporation,  
Defendant in Error.

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SUPPLEMENTAL BRIEF OF DEFENDANT  
IN ERROR

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Upon Writ of Error to the District Court of the United  
States for the District of Oregon.

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By leave of Court, we submit the following supplemental brief:

Omitting further formal statement of the allegations contained in the second amended complaint, it appears therefrom that the plaintiff is suing the defendant for the value of timber cut in the winters of **1901-1902** on 40 acres of land described in the complaint.

The suit is based upon an alleged claim of right secured to plaintiff by the Act of Congress of **JULY, 1898.**

The land in question from which the timber was cut was within the place limits of the grant to the Northern Pacific Railroad Company of **1864**.

The definite location of the line of railroad of the Northern Pacific Railroad Company opposite the land from which the timber was cut was fixed in **1882**.

A patent was issued by the United States Government to the Northern Pacific Railroad Company to the land in **1895**.

William N. Stanley, who cut the timber from the land and sold same to respondent, made homestead application therefor in 1896, which homestead application was **DENIED**.

The Secretary of the Interior of the United States listed the land for relinquishment in **1905**.

The Northern Pacific Railroad Company conveyed the land to the United States Government in **1907**, the United States Government accepting said deed on **JANUARY 3, 1908**.

A homestead application of William N. Stanley was allowed **JANUARY 28, 1908**.

William N. Stanley relinquished said entry **APRIL 6, 1908**.

The foregoing discloses the material dates in chronological order important to this appeal, with this exception: On January 29, 1908 (date above referred to), said William N. Stanley submitted proof that he had made and filed a homestead application for the

land December 30, 1896 (date mentioned above), and in which said application he alleged settlement and residence thereon since the year **1891** (second amended complaint, paragraph IV).

The foregoing exception embraces the point in appellant's case which is: That the listing of the land for relinquishment in **1905**, AFTER THE TIMBER WAS CUT, related back to and took effect as of **JULY 1, 1898**, BEFORE THE TIMBER WAS CUT, by reason of the alleged residence and occupation of the premises in 1891 by Stanley, such residence and occupation constituting a dispute between Stanley and the Northern Pacific Railroad Company sufficient for the application of the Act of July 1, 1898.

STATE OF THE RECORD IN 1891 WHEN  
STANLEY IS ALLEGED TO HAVE ENTERED  
UPON THE PREMISES, AND WHEN THE ACT  
OF JULY 1, 1898 WAS PASSED.

1891 is the year of the initial right, if any can be said to have ever existed in Stanley, whereby the act of July 1, 1898 could be made to apply to this case. At this time Congress had granted to the Northern Pacific Railroad Company various odd sections of land dependent for identification upon the location of the company's line of railroad, and in 1882 the Railroad Company had located its line opposite this land, had filed in the proper department maps and surveys of its right of way, had performed all of the acts necessary in order to entitle it to a patent to such land as was affected by the grant of 1864, and the land in question, with other lands in a like situation, **HAD BEEN WITHDRAWN FROM ENTRY AS PUBLIC LAND**

WHEN STANLEY IN **1891** IS SAID TO HAVE ENTERED THEREON.

It is established law that the right of the Railroad Company to a patent for such lands was fixed as of the date of location of its line of railway and the filing of its maps and surveys in the proper department, so that the record of title to this land in and following the year 1882, and including the date of the alleged settlement by Stanley, was analogous to settlement by an intending homesteader upon land open for public entry, who, pursuing to a conclusion the rights obtained by his settlement, secures a patent from the Government, which patent relates back to the date of his settlement. SO THAT IT APPEARS FROM THE COMPLAINT IN THIS CASE THAT STANLEY WAS A MERE TRESPASSER IN **1891**.

Again, when the Act of 1898 was passed, a patent had been issued by the United States Government to the Northern Pacific Railroad Company, and the Northern Pacific Railroad Company had absolute title of record to the land in question upon which there was not a shadow of cloud. In 1896, Stanley made his homestead application, which was of necessity denied, SO THAT WHEN THE ACT OF **1898** WAS PASSED, THE TITLE TO THE LAND WAS NOT IN DISPUTE, AND IT REMAINED ABSOLUTE IN THE NORTHERN PACIFIC RAILROAD COMPANY.

Continuing the analysis, the timber was cut in the winters of 1901 and 1902, MORE THAN FIVE YEARS AFTER STANLEY'S APPLICATION HAD BEEN DENIED, AND FROM THREE TO FOUR YEARS AFTER THE ACT OF **1898** HAD BEEN

PASSED, during which time the title to the land remained in the Northern Pacific Railroad Company absolutely clear of cloud of any kind.

## PURPOSE OF ACT OF JULY 1, 1898.

This act has been freely commented upon in the briefs heretofore filed, but we will presume here to state the substance of the history leading up to its enactment.

The grant to the Railroad Company of 1864 had defined the Eastern terminus as "some point on Lake Superior in Minnesota or Wisconsin," and in 1882, the Railroad Company transmitted to the Secretary of the Interior a map of definite location covering the proposed line from a point near Duluth, Minnesota, to Ashland, Wisconsin. This map was approved, AND THE LANDS EMBRACED BY IT WERE WITHDRAWN FROM SALE OR ENTRY.

The Board of Directors of the Railroad Company adopted a resolution in 1884 declaring ASHLAND to be the eastern terminus of the road, which resolution was accepted by the Secretary as establishing such terminus.

In 1896, the Secretary ruled that DULUTH, not Ashland, was the eastern terminus, and that, therefore, the grant of 1864 did not embrace ANY LANDS between Duluth and Ashland; the company's list of selections was cancelled, and the LANDS OPENED FOR SALE AND ENTRY, after which the defendants in the case of *Humbird v. Avery*, 195 U. S., page

480, located and made entries on the lands between Duluth and Ashland.

Thereafter, and in 1898, before the Act of July 1, 1898, was passed, the Supreme Court of Wisconsin held that ASHLAND, and not Duluth, was the eastern terminus of the railway, this decision being contrary to the ruling of the Interior Department in 1896, which judgment of the Supreme Court of Wisconsin was affirmed by the Supreme Court of the United States and as a result, as stated by Justice Harlan in the case of *Humbird v. Avery*, supra:

“Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers, both sides claiming under the United States. *The disputes had arisen out of conflicting orders or rulings of the Land Department*, and it became the duty of the Government to remove the difficulties which had come upon the parties in consequence of such orders.”

and the distinguished Jurist further states in this case:

“In the light of that situation, Congress passed the act of 1898.”

WERE THE DIFFERENCES BETWEEN STANLEY AND THE NORTHERN PACIFIC RAILROAD COMPANY WITHIN THE PURVIEW OF THE ACT OF 1898?

The facts set forth in the complaint as to the “dispute” between Stanley and the Northern Pacific

Railroad Company when read in the light of the foregoing statement of facts giving rise to the enactment of July 1, 1898, makes it clear that this dispute was to say the least, not an "aggravated" one, and, from the fact of the denial of Stanley's application in 1896, this entry and application did not, and in law could not, have received the serious consideration of the Department.

The unwarranted, unlawful entry of Stanley in 1891, in face of the record showing that the Northern Pacific Railroad Company had fulfilled all of the requirements of the law and was thereby entitled to its patent, was, as stated above, the act of a mere trespasser. The act of the department in denying his application in 1896 was in full conformity with law and an actual adjudication that Stanley was a mere trespasser, and had no rights in the premises. There were no conflicting decisions or rulings of the Department. There were no acts of the department which could in any wise mislead Stanley whereby a reasonable dispute could have been engendered between him and the Railroad Company, and a mere abstract physical entry upon the land by Stanley had been declared by the Department in 1896 worthless in law.

**THE LAW OF 1898 WAS NOT INTENDED TO REVIVE AND LEGALIZE UNLAWFUL AND UNREASONABLE CONDITIONS CREATED BY A MERE TRESPASSER.**

It was hinted in the argument, nowhere suggested in the brief of opposing counsel, that the action of the Department in 1905, in listing the land for relinquishment by the Railroad Company, was an adjudication of Stanley's good faith and cannot be attacked col-

laterally here, and under certain conditions this would be true; but in the case at bar the complaint has presumed to set out all of the acts of the parties whereby and by reason of which it is claimed by the appellant that the Act of July 1, 1898, applies to the history of of the title to the land in question; it is from that statement of facts we argue that the Act of July 1, 1898, cannot affect the title to this land, because the complaint shows and relies upon the facts from which it is claimed Stanley's "dispute" with the Railroad Company was a substantial one and his entry in 1891 made in good faith.

In other words, the brief of opposing counsel brings the issue directly before the Court as a matter of law as to whether the facts alleged in the complaint are sufficient to show that the law of July 1, 1898, passed for the purpose of the adjustment of disputes between settlers and the Railroad Company, should be invoked to adjust an alleged dispute between Stanley and the Railroad Company.

The question cannot arise here then as to whether or not the decision of the Secretary in listing this property is conclusive; indeed, it is only by inference, as will be seen from reading the paragraph at the top of page 18 of the transcript, that opposing counsel allege this relinquishment to have been under the Act of July 1, 1898.

Should it be claimed that the events subsequent to cutting the timber as set forth in the complaint beginning with the listing of the property by the Secretary and continuing with the deed from the Railroad Company to and its acceptance by the Government, the allowance of homestead entry of Stanley and relinquish-

ment thereof by him to the appellant, would as a matter of law bring this case within the Act of July 1, 1898, we earnestly urge that the appellant cannot rely upon any act prior to the listing by the Secretary, and that up to that time the record was clear, showing absolute title in the Northern Pacific Railroad Company.

## PROVISIONS OF ACT OF 1898 AND ELECTION OF SETTLER THEREUNDER.

Paragraph 2 provides in substance that the settler in good faith may refuse to transfer his entry made upon any disputed territory, whereupon the Railroad Company shall be entitled to select in lieu of such land an equal quantity elsewhere.

Paragraph 6 provides that the settler may relinquish his claim of entry upon land in disputed territory, in which event he, the settler, shall obtain in lieu thereof other public lands.

These two paragraphs determine that the selection by the settler is a pre-requisite to the right of the Secretary to list the lands for relinquishment. The complaint does not allege that Stanley made an election of his right to retain or surrender the land, but it does charge that he cut the timber in the winters of 1901 and 1902, and it is argued that the cutting of the timber is the election by Stanley.

The opinion of the Secretary of the Interior in the case of the Northern Pacific Railroad Company v. Huston, the quotation from which appears on page 12 of appellant's brief, is to the effect only that the settler is estopped from making any other selection. In the

Huston case the settler had denuded the land of its timber and attempted to surrender it, the land, which would leave the land diminished in value in the Railroad Company, and the Department very properly held that this could not be done on the ground that the settler had estopped himself from surrendering this and acquiring other public land by his own act of destroying the value of the first tract by cutting the timber therefrom.

In the case at bar, the record discloses that the act of cutting the timber, which appellant claims to be the election by Stanley, was performed while the title of the land was in the Northern Pacific Railroad Company free from any act of selection prior to said cutting, and the timber was removed from the land by Stanley and sold before any overt act of the Secretary of the Interior was performed looking to listing the land for relinquishment, thus bringing the case directly within one point of the decision in the case of *United States v. Loughrey*, 172 U. S. 206.

The Loughrey case arose out of the following facts: The United States Government had granted to the State of Michigan certain lands for the purpose of constructing certain railroads, and there was contained in the Act a provision as follows:

“If any of said road is not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States.”

The timber from certain lands within this grant was cut after the ten years had expired, but before any act of Congress reverting the lands to the United

States had been passed. After considering matters to which we will refer hereafter, and directly upon the point which we are now attempting to make, Mr. Justice Brown, speaking for a majority of the Court, says:

“Conceding all that is contended for by the plaintiffs with respect to the revestiture of the *title* to the *lands* by this Act, it does not follow that the title to the *timber* which had been cut in the meantime was also revested in the United States. As was said in *Schulenberg v. Harri-*man, the title to the timber remained in the State after it had been severed; *but it remained in the State as a separate and independent piece of property; and if the State had elected to sell it, a good title would have thereby passed to the purchaser notwithstanding the subsequent act of forfeiture. It did not remain the property of the State as a part of the land, but as a distinct piece of property, although the State took its title thereto through and in consequence of its title to the lands. From the moment it was cut, the State was at liberty to deal with it as with any other piece of personal property.*”

The timber, the value of which constitutes the subject of this action, was cut while the land appeared upon the records in the name of the Northern Pacific Railroad Company, and we insist that at the time of its cutting, under the holding in the Loughrey case, was the property of the Northern Pacific Railroad Company, could be sold by that company, and the destruction of the timber, or the recovery of the amount for which it was sold at the time the timber was removed from the land, constituted a cause of action in

the Northern Pacific Railroad Company and not in the appellant AT THE TIME THE TIMBER WAS CUT AND REMOVED FROM THE LAND, and unless this cause of action has been transferred to the appellant, the reversion of the TITLE to the land in the appellant does not transfer the cause of action.

The reasoning of the Department in the case of the Northern Pacific Railroad Company v. Huston and upon which the appellant relies in this feature of the case, is that the settler having reduced materially the value of the land by cutting the timber, is estopped from exchanging it for other public lands, and the Railroad Company is not compelled to retain a tract of land the value of which has been so materially reduced. In other words, when the Department declared that Stanley had made his election by the cutting of the timber, thus diminishing the value of the land, and by reason thereof listed it for relinquishment by the Railroad Company, IT DID SO UPON THE PRESUMPTION THAT THE LAND HAD BEEN DENUDED OF ITS TIMBER—THE TIMBER HAD BEEN REMOVED FROM THE LAND AND NO LONGER FORMED A PART OF IT.

After the timber was cut from the land, the Railroad Company and Stanley might have agreed that the Railroad Company should retain the land, in which event it would not have been listed.

Hence, up to the time of listing the land for relinquishment, we earnestly urge that the title to the land was in the Northern Pacific Railroad Company absolutely, and that, therefore, as in the Loughrey case, the title to the timber was in the Northern Pacific Railroad Company and had not thereafter by any conveyance

or act of the Department in relinquishing the title to the land been conveyed to the appellant. In other words, the Government by declaring the cutting of the timber to be Stanley's election under the Act recognized the removal of the timber while the title to the land was in the Northern Pacific Railroad Company, and it has taken no steps to acquire that title from the Railroad Company.

Further, we would urge that the act of cutting the timber, while very properly estopping the settler from obliging the Railroad Company to retain the land, should not be accepted or declared by a court as notice where the rights of third parties have intervened, or, more correctly speaking, where innocent purchasers have been involved in the transaction. The selection by the settler in order to put the Act of 1898 in operation so as to affect all other persons than himself, should be made in some form or other a MATTER OF RECORD in order that the proceedings whereby the settler's rights and the Railroad Company's rights are determined may be said to have been initiated, and to which all subsequent proceedings may be said to have relation; it seems inequitable to charge this respondent, an innocent purchaser, with the value of timber cut from Government land WHEN AT THE TIME OF THE CUTTING THE LAND HAD BEEN PATENTED BY THE GOVERNMENT TO THE RAILROAD COMPANY, and no record of a cloud upon that patent appearing in the Department or accessible to this respondent.

As stated in our original brief, the Government did not perform any act in connection with the relinquishment for seven years after the passage of the Act of

July 1, 1898, and for more than two years after the removal of the timber from the land.

There was a condition of the title at the time this timber was cut that had been confirmed by a decision of the Department in 1896, and had not otherwise been disturbed for twenty years from 1882, the time of the definite location of the railroad. The respondent had proceeded upon the assumption that the land in question was not public land, and in face of the record up to the time of listing by the secretary we insist that the appellant should not now be allowed to claim that it was government land at a time when its own patent was in effect and before it made a substantial record of the possibilities that it might thereafter become public land.

It is extending the doctrine of *lis pendens* beyond reason, as the theory upon which the title relates back to a date prior to the date of the deed is that the proceedings between the initiatory act and the final act of completing title are matters of record and in the nature of proceedings *pendente lite*, and therefore notice to all persons.

THE APPELLANT IS ASKING THIS COURT TO HAVE THE DEED OF THE NORTHERN PACIFIC RAILROAD COMPANY AND ITS ACCEPTANCE BY THE APPELLANT TO RELATE BACK AND TAKE EFFECT DURING A PERIOD WHEN THE PATENT ISSUED BY THE APPELLANT ITSELF WAS IN FULL FORCE AND EFFECT.

## DOCTRINE OF RELATION.

Much has been said in the brief of appellant about the doctrine of relation, but the conclusions of opposing counsel extend this doctrine beyond the limits of any case referred to in their brief, or in the opinion of Justice Brown in the Loughrey case.

Our contention is that the doctrine of relation as applicable to this case cannot go back further than the first record made in the Department of the Interior of the United States; that that record is the initial record whereby the possible rights of the Government under the application of the Act of July 1, 1898, to this particular piece of land, was published to the world, which was the date of the listing by the Secretary of the Interior of this land for relinquishment.

There is no better collection of cases defining this doctrine of relation than that contained in the brief of counsel for appellant and in the opinion of Justice Brown in the Loughrey case.

Respondent does not ask this Court to go as far in its application of the doctrine of relation as does the decision of the Supreme Court of the United States in the Loughrey case. In the Loughrey case the granting act itself provided for the forfeiture, and the Supreme Court declined to extend the act forfeiting the land and revesting the title in the Government back to the date of the expiration of the ten years within which time the railroad should be constructed so as to give a right of action for timber cut on the land after the expiration of the ten years and before the Act of Congress revesting the title in the Government.

How much more clearly would the principle of

such a ruling apply to this case. The Act of July 1, 1898, gave the settler certain rights under certain conditions and provided simply the procedure whereby those rights could be established. The application of the Act to any particular tract of land was dependent upon the act of the Department for the law did not of itself establish any right of the settler or the Government in any particular tract of land until the land was listed for relinquishment.

With this additional brief supplementing the original brief, we submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

CAKE & CAKE,

Attorneys for Respondent.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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J. F. WETZEL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of the  
Northern District of California, First Division.

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Filed

FEB 15 1916

F. D. Monckton,  
Clerk.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

J. F. WETZEL,

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*United States of America, District Court of the  
United States, Northern District of California.*

Clerk's Office.

No. 5156.

UNITED STATES OF AMERICA,

vs.

J. F. WETZEL,

Defendant.

**Praecipe [for Transcript of Record].**

To the Clerk of Said Court:

Sir: Please issue Indictment.

Dec. 9th, 1912. Motion to Quash Indictment.

Dec. 11th, 1912. Order overruling Motion to Quash.

Dec. 13th, 1912 Motion to Require United States to  
Elect.

Dec. 23, 1912. Demurrer to Indictment.

Dec. 23, 1912. Order submitting Demurrer.

Sept. 21, 1914. Motion to Require United States to  
Elect.

Sept. 22, 1914. Order Denying Motion to Require  
U. S. to Elect.

Sept. 29, 1914. Order Overruling Demurrer.

Sept. 29, Defendant's Plea of Not Guilty.

Sept. 29, 1914. Minutes of Trial.

Sept. 30, 1914. All Verdicts of Guilty.

Oct. 27, 1914. Motion for New Trial.

Oct. 27, 1914. Order Granting as to First Count  
—Denied as to 2d and 3d.

Oct. 27, 1914. Motion in Arrest of Judgment.

Oct. 27, 1914. Order Denying Motion in Arrest of  
Judgment.

Apr. 12, 1915. Judgment.

Apr. 22, 1915. Petition for Writ of Error and Assignment of Errors.

Apr. 22, 1915. Order Allowing Writ of Error. [1\*]

Sept. 1, 1915. Engrossed Bill of Exceptions.

Oct. 11, 1915. Writ of Error.

Oct. 14, 1915. Admission of Service Writ of Error.

Oct. 14, 1915. Citation on Writ of Error.

Oct. 13, 1915. Bond on Appeal.

CATLIN, CATLIN & FRIEDMAN,

Attorneys for Defendant.

[Endorsed]: Filed Nov. 3, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [2]

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(Indictment.)

*In the District Court of the United States, in and for the Northern District of California, First Division.*

Sec. 211, U. S. Criminal Code.

At a stated term of said court begun and holden at the city and county of San Francisco, within and for the State and Northern District of California, on the second Monday of July, in the year of our Lord one thousand nine hundred and twelve,

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on

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\*Page-number appearing at foot of page of original certified Record.

their oaths present:

THAT

J. F. WETZEL,

whose more full and true name is to the Grand Jurors aforesaid unknown, late of the State and Northern District of California, heretofore, to wit, on the thirteenth day of August in the year of our Lord one thousand nine hundred and twelve, at the city and county of San Francisco, in the State and Northern District of California then and there being, did then and there wilfully, unlawfully, knowingly and feloniously deposit and cause to be deposited in the Postoffice establishment of the United States of America, a certain written letter and notice, which said letter and notice were inclosed in a sealed envelope on which the postage had been prepaid, and addressed to:

“Claude L. Coon,  
Box 741,  
Kingman, Ariz.”

and which said written letter and notice consisted of the figures “938,” and “100—,” pasted on the back of a printed circular containing the following, to wit:

“ROOSEVELT — JOHNSON  
GOVERNOR  
JOHNSON  
WILL SPEAK TO-NIGHT AT  
DREAMLAND RINK.” [3]

that said figures so pasted on the back of said circular as aforesaid then and there gave information that divers articles and things designed, adapted and

intended for producing abortion might be obtained at number nine thirty-eight Fillmore Street, in the city and county of San Francisco at a cost of one hundred dollars lawful money of the United States.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

### SECOND COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT

J. F. WETZEL.

whose more full and true name is to the Grand Jurors aforesaid unknown, late of the State and Northern District of California, heretofore, to wit, on the thirteenth day of August, in the year of our Lord one thousand nine hundred and twelve, at the city and county of San Francisco, in the State and Northern District of California then and there being, did then and there wilfully, unlawfully, knowingly and feloniously deposit and cause to be deposited in the Postoffice establishment of the United States of America, at said city and county of San Francisco, in said State and District, for mailing and delivery by and through and by means of said Postoffice establishment of the United States of America, a certain written letter and notice, which said letter and notice were inclosed in a sealed envelope on which the postage had been prepaid, and addressed to:

“Claude L. Coon,  
Box 741,  
Kingman, Ariz.” [4]

and which said written letter and notice is fully set forth and described in the first count of this indictment, which said description in said first count of this indictment is hereby specifically referred to and made a part of this count of this indictment, and which said letter and notice then and there gave information that an act and operation for the procuring and producing abortion would be done and performed at number nine thirty-eight Fillmore Street, in the city and county of San Francisco at a cost of one hundred dollars lawful money of the United States.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statutes of the said United States of America in such case made and provided.

### THIRD COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT

J. F. WETZEL,

whose full and true name is to the Grand Jurors aforesaid unknown, late of the State and Northern District of California, heretofore, to wit, on the thirteenth day of August, in the year of our Lord one thousand nine hundred and twelve, at the city and county of San Francisco, in the State and Northern District of California then and there being, did then and there wilfully, knowingly and feloniously deposit and cause to be deposited in the Postoffice establishment of the United States of America, at said city and county of San Francisco in said State and District, for mailing and delivery by and through

and by means of said Postoffice establishment of the United States of America, a certain written letter and notice, which said letter and notice were inclosed in a sealed envelope on which the postage had been prepaid, and addressed to: [5]

“Claude L. Coon,  
Box 741,  
Kingman, Ariz.”

and which said written letter and notice is fully set forth and described in the first count of this indictment, which said description in said first count of this indictment is hereby specifically referred to and made a part of this count of this indictment, and which said letter and notice then and there gave information that an abortion would be produced by him, the said J. F. Wetzel at number nine thirty-eight Fillmore Street, city and county of San Francisco, for the sum of one hundred dollars lawful money of the United States.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such *case and* provided.

J. L. McNAB,  
United States Attorney.

Names of witnesses examined before the Grand Jury on finding the foregoing indictment.

W. I. MADEIRA.

[Endorsed]: A True Bill. A. S. Carman, Foreman Grand Jury. Presented in Court and Filed Oct. 11, 1912. Jas. P. Brown, Clerk. By C. W. Calbreath, Deputy Clerk [6]

*In the United States District Court in and for the  
Northern District of California, First Division.*

No. 5156.

UNITED STATES OF AMERICA,

vs.

J. F. WETZEL,

Defendant.

**Motion to Quash, Set Aside and Dismiss Indictment.**

Now comes the defendant and by Catlin & Catlin his counsel objects to the indictment in the above-entitled action and moves the Court to quash, set aside and dismiss the said indictment upon the ground that it appears on the face thereof that the said indictment charges the defendant three times with the same and identical offense.

Wherefore the defendant prays that said indictment be quashed, set aside and dismissed and that he may go hence without day.

CATLIN & CATLIN,  
Attorneys for Defendant.

[Endorsed]: Filed Dec. 9, 1912. W. B. Maling,  
Clerk. By Francis Krull, Deputy Clerk. [7]

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At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 11th day of De-

ember, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 5156.

UNITED STATES,

vs.

J. F. WETZEL,

**(Order Overruling Motion to Quash.)**

By the Court ordered that the motion to quash heretofore submitted to the Court for decision herein be, and the same is hereby overruled. [8]

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*In the United States District Court in and for the Northern District of California, First Division.*

No. 5156.

UNITED STATES OF AMERICA,

vs.

J. F. WETZEL,

Defendant.

**(Motion to Require United States to Elect upon Which Count It will Try Defendant.**

Now comes the defendant in the above-entitled action and by his attorneys, Catlin & Catlin, moves the Court for an order requiring the United States to elect, select and choose from the three counts in the indictment contained, upon which count it will try the defendant.

CATLIN & CATLIN,  
Attorneys for Defendant.

[Endorsed]: Filed Dec. 13, 1912. W. B. Maling,  
Clerk. By Francis Krull, Deputy Clerk. [9]

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*United States District Court in and for the North-  
ern District of California, First Division.*

No. 5156.

UNITED STATES,

vs.

J. F. WETZEL,

Defendant.

**Demurrer to Indictment.**

Now comes the defendant, J. F. Wetzel, by Catlin & Catlin, his attorneys, and not admitting any of the allegations set forth in the indictment or any of the counts set up therein, files this, his demurrer to the said indictment and to the whole thereof and to each count thereof and as ground of demurrer specifies as follows:

I.

That the said indictment and whole thereof does not state facts sufficient to constitute an offense against the laws of the United States or any offense at all.

II.

That the first count in said indictment contained does not state facts sufficient to constitute an offense against the laws of the United States or any offense at all.

III.

That the second count in said indictment contained

does not state facts sufficient to constitute an offense against the laws of the United States or any offense at all.

## IV.

That the third count in said indictment contained does not state facts sufficient to constitute an offense against the laws of the United States or any offense at all. [10]

## V.

That the said indictment and the whole thereof is ambiguous in this to wit, that the language of the letter and notice alleged therein to have been deposited in the Postoffice establishment of the United States is without unlawful meaning and is without any meaning whatever upon its face and it cannot be ascertained from said indictment how or in what manner said language gave information prohibited by section 211 of the Criminal Code or any other law of the United States;

That the said indictment and the whole thereof is further ambiguous in this, to wit, that it cannot be ascertained therefrom wherein, how or why the words "938" and "100" pasted, as alleged in said indictment, upon the back of a printed circular containing the following, to wit:

"ROOSEVELT — JOHNSON

GOVERNOR

JOHNSON

WILL SPEAK TO-NIGHT AT

DREAMLAND RINK"

gave any information prohibited by section 211 of

the Criminal Code or by any other law of the United States;

That the said indictment and the whole thereof is further ambiguous in this, that it cannot be ascertained therefrom whether the figures "938" and "100" and the words, "Roosevelt, Johnson, Governor Johnson will speak to-night at Dreamland Rink" are used as a cipher or cryptogram or whether the said figures, words and language are to be taken in their accepted use in English;

That the said indictment and the whole thereof is further ambiguous and is also facetious and frivolous in this, that it sets forth in large, accentuated and capitalized type the names of the candidates for President and Vice-President of the United States of a certain political party and the name of Governor [11] of the State of California, and the place and time of a campaign meeting, and it does not set forth in what way or in what manner the said names and matter were used in connection with the giving of the information, as alleged in said indictment, prohibited by section 211 of the Criminal Code or any other law of the United States.

#### VI.

That the said indictment and the whole thereof is uncertain for the same reasons and upon the same grounds as set forth hereinbefore in paragraph V of this demurrer.

#### VII.

That the said indictment and the whole thereof is unintelligible for the same reasons and upon the

same grounds as set forth hereinbefore in paragraph V of this demurrer.

### VIII.

That the first count in said indictment contained is ambiguous in this, to wit:

That the figures and language of the notice and letter alleged to have been deposited in the Post-office establishment of the United States is without unlawful meaning and without any meaning whatever upon its face and it cannot be ascertained from said first count in said indictment contained how or in what manner said letter and notice gave information, as alleged in said indictment, that divers articles and things designed, adapted and intended for producing abortion might be obtained at number nine thirty-eight Fillmore Street in the city and county of San Francisco at a cost of one hundred dollars lawful money of the United States;

That the said first count in said indictment is further ambiguous in this, to wit, that it cannot be ascertained therefrom wherein, how or why the figures "938" and "100" pasted, as alleged [12] in said indictment, upon the back of a printed circular containing the following, to wit:

"ROOSEVELT — JOHNSON  
GOVERNOR  
JOHNSON  
WILL SPEAK TO-NIGHT AT  
DREAMLAND RINK"

gave information, as alleged in said indictment, that divers articles and things designed, adapted and in-

tended for producing abortion might be obtained at number nine thirty-eight Fillmore Street in the city and county of San Francisco, at a cost of one hundred dollars lawful money of the United States.

IX.

That the said first count in said indictment contained is uncertain for the same reasons and upon the same grounds as set forth hereinbefore in paragraph VIII of this demurrer.

X.

That the said first count in said indictment contained is unintelligible for the same reasons and upon the same grounds as hereinbefore set forth in paragraph VII of this demurrer.

XI.

That the second count in said indictment contained is ambiguous in this, to wit:

That the figures and language of the notice and letter alleged to have been deposited in the Post-office establishment of the United States is without unlawful meaning and without any meaning whatever upon its face and it cannot be ascertained from said second count in said indictment contained how or in what manner said letter and notice gave information, as alleged in said second count, that an act and operation for the procuring and producing abortion would be done and performed at number nine thirty-eight Fillmore Street in the city and county of San Francisco at a cost of one hundred dollars lawful money of the [13] United States;

That the said second count in said indictment is further ambiguous in this, to wit, that it cannot be

ascertained therefrom wherein, how or why the figures "938" and "100" pasted, as alleged in said second count, upon the back of a printed circular containing the following, to wit:

"ROOSEVELT — JOHNSON  
GOVERNOR  
JOHNSON  
WILL SPEAK TO-NIGHT AT  
DREAMLAND RINK"

gave information, as alleged in said indictment, that an act and operation for the procuring and producing abortion would be done and performed at number nine thirty-eight Fillmore Street in the city and county of San Francisco at a cost of one hundred dollars lawful money of the United States:

XII.

That the second count in said indictment contained is uncertain for the same reasons and upon the same grounds as hereinbefore set forth in paragraph XI of this demurrer.

XIII.

That the said second count in said indictment contained is unintelligible for the same reasons and upon the same grounds as hereinbefore set forth in paragraph XI of this demurrer.

XIV.

That the third count in said indictment contained is ambiguous in this, to wit:

That the figures and language of the notice and letter alleged to have been deposited in the Post-office establishment of the United States is without

unlawful meaning and without any meaning whatever upon its face and it cannot be ascertained from said third count in said indictment contained how or in what manner said letter and notice gave information, as alleged in said [14] third count, that an abortion would be produced by the said defendant, the said J. F. Wetzel, at number nine thirty-eight Fillmore Street, city and county of San Francisco, for the sum of one hundred dollars lawful money of the United States.

That the said third count in said indictment is further ambiguous in this, to wit, that it cannot be ascertained therefrom wherein, how or why the figures "938" and "100" pasted, as alleged in said third count, upon the back of a printed circular containing the following, to wit:

"ROOSEVELT—JOHNSON  
GOVERNOR  
JOHNSON  
WILL SPEAK TO-NIGHT AT  
DREAMLAND RINK"

gave information, as alleged in said indictment, that an abortion would be produced by the said defendant, the said J. F. Wetzel, at number nine thirty-eight Fillmore Street, city and county of San Francisco, for the sum of one hundred dollars lawful money of the United States.

XV.

That the said third count in said indictment contained is uncertain for the same reasons and upon the same grounds as hereinbefore set forth in paragraph XIV of this demurrer.

## XVI.

That the said third count in said indictment contained is unintelligible for the same reasons and upon the same grounds as hereinbefore set forth in paragraph XIV of this demurrer.

WHEREFORE, this defendant prays that this demurrer be sustained and that he go hence without day.

Dated this 14th day of December, 1912.

CATLIN & CATLIN,

Attorneys for Defendant. [15]

Received copy this 16th day of December, 1912.

J. L. McNAB,

U. S. Attorney.

[Endorsed]: Filed Dec. 23, 1912. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [16]

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At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 23d day of December, in the year of our Lord one thousand nine hundred and twelve. Present: the Honorable WM. C. VAN FLEET, Judge.

#5156.

UNITED STATES

vs.

WETZEL.

**(Order Submitting Demurrer.)**

The demurrer to the indictment herein this day came on for hearing and after hearing John C. Catlin, Esqr., in support thereof and John L. McNab, U. S. Atty., in opposition by the Court ordered that said demurrer be, and the same is hereby submitted to the Court for determination upon points to be filed as requested by counsel. [17]

**[Order of Submission of Motion to Require United States to Elect, etc.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 21st day of September, in the year of our Lord one thousand nine hundred and fourteen. Present: the Honorable M. T. DOOLING, District Judge.

No. 5156.

UNITED STATES OF AMERICA

vs.

J. F. WETZEL.

In this case on motion of John C. Catlin, Esq., Attorney for defendant, in the presence of John W. Preston, Esq., United States Attorney, moved the Court for an order requiring said United States Attorney to elect upon which of the counts in the indictment herein he would proceed to try the said defendant, and for a further order requiring said United States Attorney to furnish said defendant

with a bill of particulars in this case. Thereupon, the Court ordered said motions submitted. [18]

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At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the 22d day of September, in the year of our Lord one thousand nine hundred and fourteen. Present: the Honorable M. T. DOOLING, District Judge.

No. 5156.

THE UNITED STATES OF AMERICA

vs.

J. F. WETZEL.

**(Order Denying Motion to Require United States to Elect, etc.)**

The Court this day denied the motion of defendant for order directing the United States Attorney to elect upon which of the counts of the indictment herein the United States would proceed to try the said defendant. [19]

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**[Minutes of Trial, September 29, 1914—Order Overruling Demurrer, etc.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San

Francisco, on Tuesday, the 29th day of September, in the year of our Lord one thousand nine hundred and fourteen. Present: the Honorable M. T. DOOLING, District Judge.

No. 5156.

UNITED STATES OF AMERICA

vs.

J. F. WETZEL.

This case this day came on regularly for trial and upon being called D. E. Fulwider, Esq., Assistant United States Attorney, and John C. Catlin, Esq., appeared on behalf of defendant, answered ready for trial. Thereupon, the defendant being present, the Court ordered that the trial of this case do now proceed and that the jury-box be filled from the regular panel of trial jurors of this court. Accordingly the hereinafter named persons were duly sworn and examined, to wit: F. W. Schwingle accepted, C. Fred'k. Kohl peremptorily challenged by defendant and excused, Homer T. Bickel peremptorily challenged by defendant and excused, Christian Helwig accepted, Chas. M. Yates, Jr., accepted, Luther Wagoner accepted, Alfred I. Coffey accepted, Geo. S. Garritt accepted, Joseph J. Mason accepted, Newton H. Barry accepted, Bertram L. Wilcox accepted, B. J. Williams accepted, Geo. W. Kline accepted, and Geo. Booker accepted.

Thereupon, it appearing to the Court that a demurrer to the indictment is still pending and that defendant has not plead to the indictment herein against him, it is ordered that said demurrer be, and

the same is hereby, overruled and that defendant plead to the indictment herein against him. Accordingly, defendant then and there entered a plea of Not Guilty, which plea the Court ordered, and the same is hereby, entered.

Twelve persons having been accepted to serve as Jurors to try this case, were thereupon duly sworn, to wit:

F. W. Schwingle,	Alfred I. Coffey,
Christian Helwig,	Geo. S. Garritt,
Chas. M. Yates, Jr.,	Joseph J. Mason,
Luther Wagoner,	Newton H. Barry,
Geo. W. Kline,	Bertram L. Wilcox,
George Booker,	B. J. Williams.

Thereupon, Mr. Fulwider and Mr. Catlin stated the case to the Court and Jury.

Mr. Fulwider then called Geo. A. Leonard, J. N. Cohenour and W. I. Madeira, who were each duly sworn and examined on behalf of the United States, and introduced in evidence certain exhibits which were filed and marked respectively U. S. Exhibit 1 (letter), 2 (circular), 3 (memo.) and 4 (memo), and thereupon rested the case for the United States.  
[20]

Mr. Catlin then called J. M. Chass, W. P. Agnew, Mrs. R. Plummer, Charles A. Jenkins, Mrs. M. A. Woodall and defendant, J. W. Wetzel, who were each duly sworn and examined on behalf of defendant.

The hour of adjournment having arrived, the Court ordered that the further trial of this case be, and the same is hereby, continued until September 30th, 1914, at 10 o'clock A. M. [21]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 30th day of September, in the year of our Lord, one thousand, nine hundred and fourteen. Present: the Honorable M. T. DOOLING, District Judge.

No. 5156.

UNITED STATES OF AMERICA

vs.

J. F. WETZEL.

(Minutes of Trial [September 30, 1914—Verdict, etc.] )

The trial of this case was this day resumed. Jury sworn to try this case was present. D. W. Fulwider, Esq., appearing as Assistant United States Attorney, and John C. Catlin, Esq., his Attorney, for defendant. The defendant was present and resumed the stand for further examination. Mr. Catlin then called Ellen I. Beach, who was duly sworn and examined on behalf of defendant, and introduced in evidence a certain receipt, which was filed and marked Defendant's Exhibit "A" and thereupon rested the defense of defendant. Mr. Fulwider then called in rebuttal W. I. Madeira and J. W. Ricks and also K. J. Kraus, each of the last two named persons were duly sworn and all three examined on behalf of the United States, and introduced in evidence a copy of a certain advertisement, which was filed and

marked U. S. Exhibit "5." Mr. Catlin then called in rebuttal Helen Heath, who was duly sworn and examined on behalf of defendant. Mr. Fulwider and Mr. Catlin then argued the case to the Jury, who at 4 o'clock and 50 minutes P. M., retired to deliberate upon a Verdict, and subsequently returned into court at 5 o'clock and 50 minutes P. M., and in answer to a question of the Court, stated that they had agreed upon a Verdict and presented two written verdicts, which the Court ordered filed and recorded, and which are in the words following:

"We, the Jury, find J. F. Wetzel, the prisoner at the bar, Guilty.

G. W. KLINE,  
Foreman."

"We, the Jury, find J. F. Wetzel, the prisoner at the bar, Guilty on the First Count of the Indictment and Guilty on the Second and Third Counts of the Indictment.

G. W. KLINE,  
Foreman."

Thereupon, the Court ordered that the defendant herein go at large upon the bond heretofore given herein until the pronouncing of Judgment, and that the case be continued until October 3d, 1914, at which time the day will be fixed for the pronouncing of judgment accordingly. Further ordered that the jurors herein be, and they are hereby excused from further attendance upon the Court until October 2d, 1914, at 10 o'clock A. M. [22]

*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 5156.

THE UNITED STATES OF AMERICA,

vs.

J. F. WETZEL.

(Verdict.)

We, the Jury, find J. F. Wetzel, the defendant, at  
the bar, Guilty.

G. W. KLINE,

Foreman.

[Endorsed]: Filed Sept. 30th, 1914, at 5 o'clock  
and 50 minutes P. M. W. B. Maling, Clerk. By  
Lyle S. Morris, Deputy Clerk. [23]

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*In the District Court of the United States, in and  
for the Northern District of California.*

No. 5156.

THE UNITED STATES OF AMERICA

vs.

J. F. WETZEL.

(Verdict.)

We, the Jury, find J. F. Wetzel, the prisoner at  
the bar, Guilty on the first count of the Indictment,  
and Guilty on the second and third counts of the In-  
dictment.

G. W. KLINE,

Foreman.

[Endorsed]: Filed Sept. 30th, 1914, at 5 o'clock and 50 minutes P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [24]

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*In the District Court of the United States, in and for the Northern District of California, First Division.*

No. 5156.

UNITED STATES OF AMERICA

vs.

J. F. WETZEL.

**Engrossed Bill of Exceptions.**

BE IT REMEMBERED that on the 21st day of September, 1914, John C. Catlin, Esq., counsel for defendant, appeared in the above-entitled court at the opening thereof, John W. Preston, Esq., the United States Attorney, being present, and by and with the consent of the Court first had and received, did move the Court for an order requiring the United States to elect upon which of the three counts in said indictment contained it would proceed to try the defendant; that the Court thereupon forthwith denied said motion to which ruling the defendant excepted, which exception was duly allowed and entered.

BE IT FURTHER REMEMBERED that the above-entitled case was brought on to be heard before the Court and a jury on the 29th day of September, 1914, John C. Catlin, Esq., appearing for the defendant and D. E. Fulwider, Esq., Assistant United States Attorney, for the United States.

That after the jury was drawn the Court called upon the defendant to plead to said indictment and thereupon an investigation was had and it was ascertained that theretofore on the 23d day of December, 1912, the defendant had filed his demurrer to said indictment and on the same day John C. Catlin, Esq., aforesaid, had appeared in open court in support thereof, and John L. [25] McNab, Esq., United States Attorney, had appeared in opposition thereto and the same was duly submitted to the Court, Hon. Wm. C. Van Fleet, presiding. That the record did not disclose that the Court had ever acted upon the said demurrer or that the same had ever been overruled or sustained. That upon being called upon in open court on the said 29th day of September, 1914, to plead, counsel for the defendant before entering the plea of defendant by and with the consent of the Court, did move the Court, *ore tenus* to quash said indictment upon the ground that by it, the defendant was charged three separate times with the same identical offense against the laws of the United States. That the Court heard said motion and denied the same and the defendant excepted to said ruling, which exception was allowed and entered. That the Court thereupon overruled the demurrer and called upon the defendant to plead to the indictment. That the defendant excepted to the order overruling the demurrer, which exception was allowed and entered and thereupon entered his plea of Not Guilty. That before any further proceedings were had counsel for defendant, by and with the consent of the Court, moved

the Court for an order requiring the United States to elect between the three counts in said indictment upon which of them the defendant would be tried and that the Court thereupon forthwith denied said motion to elect and the defendant excepted to said ruling, which exception was allowed and entered. That thereupon the said cause proceeded to trial.

**[Plaintiff's Proposed Amendments to Defendant's Proposed Bill of Exceptions.]**

The Plaintiff proposes the following amendments to defendant's proposed Bill of Exceptions, to wit:

I.

Exhibit No. 5, being a copy of a newspaper's paid advertisement reading as follows: "OLD RELIABLE SPECIALISTS [26] FOR WOMEN ONLY—Accommodations, nurse, adoption, etc., pay a little down. 938 Fillmore St."

II.

Exhibit No. 1, being a carbon copy of a letter mailed to Doctor, 938 Fillmore St., San Francisco, Cal., in answer to the newspaper ad, a copy of which is set forth above, the letter reading as follows, to wit:

"Kingsman, Ariz., Aug. 9, 1912.

Dear Doctor,

I am writing to you about the advertisement of yours that I see in the papers that appears to be about what I am looking for. Now I do not like to *writ* about such matters but I must of necessity. Now, doctor, I am in trouble here and my reputation means everything to me. I have got a young woman

that works for me in a family way and something must be done for her soon as she is two months gone now. Now, doctor, what I want to know is that if I bring her to your place, can you arrange that she be cared for until her condition is relieved. You understand there must be no birth. The girl can be away from here two weeks without causing any suspicion. If you will take this case please write me soon telling when you want her to come and what your fee will be. I realize I am in some danger in sending such a letter to a total stranger but in my case I cannot do otherwise. Please let me hear from you soon.

Yours,  
CLAUDE L. COON,  
Box 741."

### III

The said exhibits set forth above were a part of the matters introduced in evidence at the trial of the case, and were the cause of, and produced the mailing by the defendant, of the matter set forth in the indictment.

It is hereby stipulated and agreed by and between the attorneys for the United States and the attorneys for the defendant that the foregoing bill of exceptions has been presented in true and that it is approved, allowed and settled by the Judge of the above-entitled court, as correct in all respects and that the same [27] shall be made a part of the record in said case and be the Bill of Exceptions therein.

Dated, August 25th, 1915.

JOHN C. CATLIN & CATLIN,  
CATLIN & FRIEDMAN,

Attorneys for Defendant.

JOHN W. PRESTON,  
CASPER A. ORNBAUN.

**Order Settling Bill of Exceptions.**

The foregoing bill of exceptions, duly approved and agreed upon by counsel for the respective parties, is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein.

M. T. DOOLING,  
District Judge.

[Endorsed]: Filed Sep. 1, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [28]

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*In the District Court of the United States in and  
for the Northern District of California, First  
Division.*

No. —.

UNITED STATES.

vs.

J. F. WETZEL,

Defendant.

**Motion for New Trial.**

Now comes the defendant and by Catlin & Catlin, his counsel, moves the Court for an order setting aside the verdict of guilty herein and granting the defendant a new trial upon the following grounds:

1. That the Court misdirected the jury in matters of law.

2. That the Court erred in the decision of questions of law arising during the course of the trial.

3. That the verdict is contrary to law.

4. That the verdict is contrary to the evidence.

5. That the evidence is insufficient to sustain the verdict.

6. That the Court erred in admitting certain evidence offered by the United States over the objection of defendant.

WHEREFORE defendant prays that the verdict of guilty be set aside and the defendant be given a new trial.

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Attorneys for Defendant.

[Endorsed]: Filed Oct. 27, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [29]

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*In the District Court of the United States in and for  
the Northern District of California, First Division.*

No. —.

UNITED STATES,

vs.

J. F. WETZEL,

Defendant.

**Motion in Arrest of Judgment.**

Now comes J. F. Wetzel by his counsel, Catlin & Catlin and moves the Court that it arrest its judgment upon the verdict of guilty herein, heretofore

found against the defendant upon the following grounds:

1. That the indictment herein does not state facts sufficient to constitute an offense against the laws of the United States or any offense at all.

2. That the first count in said indictment fails to state facts sufficient to constitute an offense against the laws of the United States or any offense at all.

3. That the second count in said indictment fails to state facts sufficient to constitute an offense against the laws of the United States or any offense at all.

4. That the third count of said indictment fails to state facts sufficient to constitute an offense against the laws of the United States or any offense at all.

WHEREFORE the defendant prays that said judgment be arrested and that the defendant go hence without day.

CATLIN & CATLIN,

Attorneys for Defendant.

[Endorsed]: Filed Oct. 27, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [30]

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**[Order Granting Motion for New Trial as to First Count of Indictment, and Denying Motion in Arrest of Judgment, etc.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the 27th day of October, in the

year of our Lord one thousand nine hundred and fourteen. Present: the Honorable M. T. DOOLING, Judge.

No. 5156.

UNITED STATES OF AMERICA,

vs.

J. F. WETZEL.

In this case the defendant was present in court with his attorney, John C. Catlin, Esq., and D. E. Fulwider, Esq., appeared on behalf of the United States. Mr. Catlin presented and filed a motion for new trial herein and motion in arrest of judgment, which, after being argued by Mr. Catlin and Mr. Fulwider, were submitted to the Court. Thereupon, the Court, after considering the same, ordered that said motion for new trial be, and the same is hereby, granted, as to the first count of the indictment, and denied as to the second and third counts of said indictment. Further ordered that said motion in arrest of judgment be, and the same is hereby, denied and ordered that the case be, and the same is hereby, continued until November 5th, 1914, for the pronouncing of judgment upon the defendant herein.

[31]

*In the District Court of the United States for the  
Northern District of California, First Division.*

No. 5156.

THE UNITED STATES OF AMERICA,

vs.

J. F. WETZEL,

Convicted of violation Section 211 Criminal Code of  
the United States.

**Judgment on Verdict of Guilty.**

Now on this 12th day of April, the defendant J. F. Wetzel, in his own proper person and with his counsel J. C. Catlin, Esq., being present in open court, *come* John W. Preston, Esq., United States Attorney, and *move* the Court that judgment be pronounced in this cause; whereupon the defendant was duly informed by the Court of the nature of the Indictment filed on the 11th day of October, 1912, charging him with the crime of violation of Section 211, Criminal Code of the United States; of his arraignment and plea of Not Guilty; of his trial and the verdict of the Jury on the 30th day of September, 1914, to wit: "We, the Jury, find J. F. Wetzel, the prisoner at the bar Guilty on the first count of the Indictment, and Guilty on the second and third counts of the Indictment, G. W. Kline, Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for a new trial, and a motion in

arrest of judgment; thereupon the Court rendered its judgment:

THAT WHEREAS, the said J. F. Wetzel, having been duly convicted in this court of the crime of violation of Section 211, Criminal Code of the United States;

IT IS THEREFORE ORDERED AND ADJUDGED that the said J. F. Wetzel be imprisoned for the term of six (6) months in the Alameda County [32] Jail, Alameda County, California.

JUDGMENT ENTERED this 12th day of April, A. D. 1915.

W. B. MALING,  
Clerk.

By C. W. Calbreath,  
Deputy Clerk. [33]

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*In the District Court of the United States, Northern  
District of California, First Division.*

No. 5156.

THE UNITED STATES OF AMERICA,  
Plaintiffs,

vs.

J. F. WETZEL,  
Defendant.

**Petition for Writ of Error.**

Your petitioner J. S. Wetzel, the defendant in the above-entitled cause, brings this, his petition for a writ of error, to the District Court of the United States, Northern District of California, First Divi-

sion, and in that behalf your petitioner says:

On the 12th of April, 1915, there was made, given, and rendered in the above-entitled court and cause a judgment against your petitioner, wherein and whereby he was adjudged and sentenced to be imprisoned in the county jail of the county of Alameda, State of California, for the period of six months, and your petitioner says that he is advised by counsel and avers that there was and is manifest error in the records and proceedings had in such cause and in the making, rendition and entry, of such judgment and sentence, to his great injury and damage, all of which error will be made to appear by an examination of the said records and by an examination of the bill of exceptions to be hereafter by your petitioner and in the assignments of errors hereafter set out and attached hereto; and to the end that the said judgments, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit your petitioner prays that a writ of error may be issued, directed therefrom, to [34] the said District Court of the United States, Northern District of California, First Division, according to law and the practice of the court and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors and all the proceedings heretofore had in said cause that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioner.

And your petitioner now makes an assignment of errors, attached hereto, upon which he will rely and which will be made to appear by return of the said record in obedience to said writ.

WHEREFORE, your petitioner prays the issuance of a writ as herein prayed and that the assignment of errors annexed hereto may be considered his assignment of errors upon the writ and that the judgment rendered in this cause may be reversed and held for naught, and that said cause may be remanded for further *procedence*, and that he be awarded a supersedeas upon said judgment and all necessary process, including bail.

J. F. WETZEL,  
Petitioner.

CATLIN, CATLIN & FRIEDMAN,  
Attorneys for Defendant. [35]

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*In the District Court of the United States, Northern  
District of California, First Division.*

No. 5156.

THE UNITED STATES OF AMERICA,  
Plaintiffs,

vs.

J. F. WETZEL,  
Defendant.

**Assignment of Errors.**

J. F. Wetzel, the defendant in the above-entitled cause and plaintiff in error, having petitioned for an order from said court granting a writ of error from

the judgment and sentence made and entered in said cause against him now makes and files with his said petition for a writ of error, the following assignment of errors upon which he will rely for a reversal of said judgment and sentence, and which said errors are to the great detriment, injury and prejudice of him, the said defendant, and in violation of the rights conferred upon him by law; and he further says that in the record of proceedings in the above-entitled cause, upon the hearing and determination thereof, in the District Court of the United States for the Northern District of California, First Division, there is manifest error in this, to wit:

1.

That the District Court erred in denying an overruling of defendant's motion to quash the indictment upon the ground that the defendant was, by the said indictment, thrice charged with the same offense.

2.

That the Court erred in denying, overruling and refusing to grant defendant's motion to compel the United States to elect upon which of the three counts in said indictment contained [36] it would try the defendant.

3.

That the Court erred in overruling the demurrer of the defendant for the reason that the same and each and every count thereof failed to state facts sufficient to constitute an offense against the laws of the United States or any offense at all.

4.

That the Court erred in not sustaining the de-

fendant's demurrer to the indictment for the reason that the said indictment and each and every count thereof is against and contrary to the letter and spirit of the Sixth Amendment of the Constitution of the United States in that it failed and fails to inform the defendant of the nature of the charge or charges against him.

5.

That the Court erred in not sustaining the demurrer of the defendant to said indictment and to the whole thereof, and each and every count thereof upon the ground that the same and each and every count thereof was ambiguous.

6.

That the Court erred in not sustaining the demurrer of the defendant to said indictment and to the whole thereof, and each and every count thereof upon the ground that the same and each and every count thereof was uncertain.

7.

That the Court erred in not sustaining the demurrer of the defendant to said indictment and to the whole thereof, and each and every count thereof upon the ground that the same and each and every count thereof was unintelligible.

8.

That the Court erred in denying, overruling and refusing to [37] grant defendant's motion made on September 21, 1914, requiring the United States to elect upon which of the three counts in said indictment contained it would try the defendant.

9.

The District Court erred in denying the defendant's motion for a new trial.

10.

That the Court erred in granting the defendant a new trial upon but one count in said indictment.

11.

That the District Court erred in overruling and denying the defendant's motion to arrest the judgment.

12.

That the Court erred in overruling the defendant's motion for a new trial and not allowing the same.

13.

That the said District Court erred in rendering its judgment upon the verdict of the jury.

That the Court erred in entering judgment and pronouncing sentence upon the defendant.

CATLIN, CATLIN & FRIEDMAN,

JOHN C. CATLIN,

HARRY C. CATLIN,

LEO. R. FRIEDMAN,

Attorneys for Defendant, J. F. Wetzel.

We hereby certify that the foregoing assignment of errors are made on behalf of the petitioner for writ of error herein, and are in our opinion, well taken, and the same now constitute assignment of

errors upon the writ prayed for.

CATLIN, CATLIN & FRIEDMAN. [38]

JOHN C. CATLIN,

HARRY C. CATLIN,

LEO. R. FRIEDMAN,

Attorneys for Said Defendant, J. F. Wetzel.

Rec'd copy of within this 22d day of April, 1915.

JOHN W. PRESTON,

U. S. Atty.

[Endorsed]: Filed Apr. 22, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [39]

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*In the District Court of the United States, Northern  
District of California, First Division.*

No. 5156.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

J. F. WETZEL,

Defendant.

**Order Allowing Writ of Error, Supersedeas and  
Fixing Bail.**

Upon motion of John C. Catlin, one of the attorneys for the defendant, J. F. Wetzel, and upon filing a petition for writ of error and assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict and judgment heretofore entered herein. That pending decision upon said writ of error the supersedeas prayed for by the defendant

in his petition for writ of error herein is hereby allowed and the defendant, J. F. Wetzel, is admitted to bail upon said writ of error in the sum of Five Hundred Dollars.

M. T. DOOLING,

Judge.

Rec'd copy of within this 22d day of April, 1915.

JOHN W. PRESTON,

U. S. Atty.

[Endorsed]: Filed Apr. 22, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [40]

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*United States District Court, Northern District of  
California, First Division.*

#5156.

UNITED STATES

vs.

J. F. WETZEL,

Defendant.

**Admission of Service.**

(Of Copy of Writ of Error.)

Service of copy of writ of error admitted this 13th day of October, 1915.

JNO. W. PRESTON,

U. S. Atty.,

Atty. for Deft. in Error and Plaintiff.

[Endorsed]: Filed Oct. 14, 1915. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [41]

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, That we, J. F. Wetzel, as principal, and Henry Warfield, S. Silberberg, as sureties, are held and firmly bound unto The United States of America in the full and just sum of Five Hundred Dollars, to be paid to the said United States of America certain attorney, assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of October, in the year of our Lord One Thousand Nine Hundred and Fifteen.

WHEREAS, lately at a District Court of the United States for the Northern District of California in a suit depending in said Court, between THE UNITED STATES OF AMERICA and J. F. WETZEL, a judgment of conviction was rendered against the said J. F. WETZEL and the said J. F. WETZEL having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said UNITED STATES OF AMERICA citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, the condition of the above obligation is such, That if the said J. F. WETZEL shall prosecute their writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the

above obligation to be void; else to remain in full force and virtue.

J. F. WETZEL. (Seal)

S. SILBERBERG. (Seal)

HENRY WARFIELD. (Seal)

Taken and acknowledged before me the day and year first above written.

[Seal]

FRANCIS KRULL,  
United States Commissioner North'n. Dist. of California. [42]

United States of America,  
Northern District of California,—ss.

Henry Warfield and S. Silberberg, being duly sworn, each for himself, deposes and says, that he is a freeholder in said District, and is worth the sum of Five Hundred Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

HENRY WARFIELD,  
S. SILBERBERG,

Subscribed and sworn to before me, this 13th day of October, A. D. 1915.

[Seal]

FRANCIS KRULL,  
United States Commissioner, North'n. Dist. of California.

Form of bond and sufficiency of sureties approved.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Oct. 13, 1915. W. B. Maling,  
Clerk. By Lyle S. Morris, Deputy Clerk. [43]

*In the District Court of the United States, in and  
for the Northern District of California, First  
Division.*

No. 5156.

UNITED STATES OF AMERICA

vs.

J. F. WETZEL,

Defendant.

**Order Extending Time to Docket Case.**

Good cause appearing therefor, and by reason of unavoidable delay in the preparation of the record, it is hereby ordered that the defendant have thirty (30) days further time *with* which to lodge the record on appeal herein with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 4th day of November, A. D. 1915.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Nov. 4, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [44]

**(Certificate of Clerk U. S. District Court to  
Transcript of the Record, etc.)**

**CERTIFICATE OF CLERK TO TRANSCRIPT  
ON WRIT OF ERROR.**

I, Walter B. Maling, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing 44 pages, numbered from 1 to 44, inclusive, contain a full, true and correct Transcript of certain

records and proceedings, in the case of the United States of America, vs. J. F. Wetzel, numbered 5156, as the same now remain on file and of record in the office of the clerk of said District Court; said Transcript having been prepared pursuant to and in accordance with "Praecipe" (a copy of which is embodied in this transcript) and the instructions of the attorney for defendant and plaintiff in error herein.

I further certify that the costs for preparing and certifying the foregoing transcript on Writ of Error, is the sum of Twenty Dollars and Eighty Cents (\$20.80), and that the same has been paid to me by the attorney for plaintiff in error herein.

Annexed hereto is the Original Citation on Writ of Error (pages 49 and 50), and the Original Writ of Error (pages 46 and 47), with the return of the said District Court to said Writ of Error attached thereto (page 48).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 4th day of December, 1915.

[Seal]

WALTER B. MALING,  
Clerk.

By C. W. Calbreath,  
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled  
12/4115. C. W. C.] [45]

**(Writ of Error [Original].)**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, To the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between J. F. Wetzel, The United States of America, Defendant in Error, a manifest error hath happened, to the great damage of the said J. F. Wetzel, Plaintiff in Error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 11th day of October, in the year of our Lord One Thousand, Nine Hundred and Fifteen.

[Seal]

W. B. MALING,  
Clerk of the United States District Court.

By Lyle S. Morris,  
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,  
U. S. District Judge. [46]

[Endorsed]: No. 5156. United States District Court for the Northern District of California.. J. F. Wetzel, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed Oct. 11, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [47]

### **Return to Writ of Error [Original].**

The Answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within writ of error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 3d day of December, A. D. 1915, duly lodged

in the case in this court for the within-named defendant in error.

By the Court:

[Seal]

WALTER B. MALING.

Clerk U. S. District Court, Northern District of California.

By C. W. Calbreath,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled  
12/4/15. C. W. C.] [48]

(Citation on Writ of Error [Original].)

UNITED STATES OF AMERICA,—ss.

The President of the United States, To The United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein J. F. Wetzel is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET  
United States District Judge for the Northern

District of California this 11th day of October, A. D. 1915.

WM. C. VAN FLEET,

United States District Judge.

Service of the within Citation on Writ of Error by receipt of copy admitted this 13 day of Oct., 1915

JNO. W. PRESTON,

U. S. Atty,

Attorney for Deft. in Error

[Endorsed]: No. 5156 United States District Court for the Northern District of California, J. F. Wetzel Plaintiff in Error, vs. The United States of America, Defendant in Error. Citation on Writ of Error. Filed Oct. 14, 1915. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk.

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[Endorsed]: No. 2696. United States Circuit Court of Appeals for the Ninth Circuit. J. F. Wetzel, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, First Division.

Filed December 4, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

No. 2696

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

J. F. WETZEL,

*Plaintiff in Error,*

VS.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

## OPENING BRIEF OF PLAINTIFF IN ERROR

CATLIN, CATLIN & FRIEDMAN,

*Attorneys for Plaintiff in Error.*

AUGUSTIN C. KEANE,

*Of Counsel.*

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.



No. 2696

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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J. F. WETZEL,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

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## OPENING BRIEF OF PLAINTIFF IN ERROR

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### Statement of the Case.

On October 11th, 1912, an indictment was presented in the District Court of the United States for the Northern District of California, First Division, charging J. F. Wetzel, the Plaintiff in Error in three counts with a violation of Section 211 of the Criminal Code, a re-enactment of Section 3893 of the Revised Statutes. (Tr. of Rec. 2, 3, 4, 5 and 6.) The counts all refer to one and the same "written letter and notice" and to but one deposit in the postoffice establishment.

The defendant came into court, represented by counsel and moved to quash the indictment upon the grounds that it was apparent on its face that it charged the defendant three times with one and the same identical offense. (Tr. of Rec. 7.) Upon this motion being denied (Tr. of Rec. 8) the position taken by the defendant was supported by a motion to require the United States to elect upon which of the three counts it would proceed against him. (Tr. of Rec. p. 8.) The Court took no action upon this motion.

On the 23rd of December, 1912, the defendant demurred to the indictment and to the whole thereof and to each and every count therein—both generally and specially and on the same day argued the questions raised thereby and submitted them in open court before Judge Van Fleet. (Tr. of Rec. pp. 16-7.)

The original record in the District Court and this printed record does not show that the Judge ever acted upon the demurrer. (See Minutes of Trial, Tr. of Rec., end of p. 19 and beginning of p. 20; also see Engrossed Bill of Exceptions, Tr. of Rec. p. 25.)

After the submission of the demurrer nothing further was done in the case for nearly two years. On September 21st, 1914, the defendant again came into court with a motion to compel the Government to elect upon which of the counts the defendant would be tried, which motion was submitted to the

Court, Judge Dooling presiding, and was by him denied (Tr. of Rec. 17-18), to which denial defendant excepted, which exception was entered and allowed. (Tr. of Rec. p. 24.)

On September 29th, 1914, the case was called and proceeded to trial. (Tr. of Rec. 19, 20, 21 and 22.) After the jury was sworn it appeared that the demurrer to the indictment was still pending, whereupon the Court overruled the same. To fully understand what here occurred it will be necessary to read the Bill of Exceptions (Tr. of Rec. 24, 25 and 26) in connection with the Minutes of the Trial. Before entering his plea the defendant with the consent of the Court moved *ore tenus* to quash the indictment upon the same grounds urged on his former motion to quash—which motion was denied and an exception taken by defendant was entered and allowed. The defendant then pleaded “Not Guilty”, but before any other steps were taken, with the consent of the Court he again moved for an order compelling an election between counts. The Court denied the motion and an exception was taken, noted and allowed. The trial then proceeded and resulted in a general verdict of Guilty and in a verdict that finds the defendant guilty on each of the three counts. (Tr. of Rec. 23.)

After the verdict the defendant moved for a new trial which was granted as to the first count in the indictment and denied as to the second and third

counts. (Tr. of Rec. pp. 29 and 31.) A motion in arrest of judgment was also made and denied (Rec. 30-31), and on April 15th, 1915, judgment on the verdict of guilty was pronounced and entered (Tr. of Rec. 32).

There being no further remedy in the District Court the defendant assigned certain errors (Tr. of Rec. pp. 35 to 38) and sued out a Writ of Error upon which the case is now before this Court.

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### **Argument.**

Two grave questions of law, both involving the right of the defendant to a fair indictment under the Fifth Amendment to the Constitution of the United States are here presented.

Like Frisbie's case this case comes before this Court upon the indictment alone.

*Frisbie vs. U. S.*, 157 U. S. 160.

We believe it to be waste of ink and paper to argue the fundamental proposition that the right to a proper and dignified indictment is not a mere privilege of a man accused of crime but that it is a right incidental to his liberty and is anchored to the Fifth Amendment. We merely state the above to be the law of the land and proceed to our discussion, taking up separately the two questions involved.

## **Argument on Motion to Quash and Motion to Compel Election.**

Our first claim is that the indictment in the case at bar deliberately charged the defendant Wetzel three times with the identical offense. There is no doubt but that under Section 211 of the Criminal Code (R. S. 3893) the mailing of a letter containing the prohibited matter is an offense against the law and that an offender may be indicted and punished. If an offender mailed two letters the indictment may accuse him twice, in separate counts, as in Burton's case, cited below, and upon conviction he may be punished twice. Stated differently, it is the plain intention of the statute to make the mailing of a letter which carries prohibited matter a crime—punishable once and once only.

One of the highest privileges possessed by an accused is the right to plead guilty if the facts justify his doing so, and to throw himself upon the mercy of the Court. Such a course is sound in morals, in law and is undoubtedly the soundest public policy. One who has voluntarily violated the law of his country can more easily rectify his wrongdoing by the plea of guilty than in any other way, and by so doing he aids the administration of justice and does much toward rehabilitating himself in public estimation. Scores of casual law breakers do this every year with benefit to themselves and the public generally.

Any construction of the law, which forecloses an offender of this right must necessarily be against public policy and consequently illogical and forced.

Not alone is the offender against the laws charged with a knowledge of them, but this presumption of knowledge is also a charge against those who accuse him and they too must follow the plainly marked path, and a grand jury is bound, if an offender has committed one offense, to accuse him once and once only.

Then he may plead guilty—and accept the punishment of a man who has once offended, or he may prepare to defend himself against the single accusation.

The grand jury which returned the indictment in the case at bar saw fit to ignore the plain letter of the law as well as its spirit and to return an indictment which put Wetzel, the Plaintiff in Error, in an impossible situation, which he, by every means known to procedure, tried to correct before pleading or going to trial.

He moved to quash upon the ground that he was thrice accused of a single offense. That motion was denied.

On the 13th of December, 1912, he made a motion to compel the United States to elect as to which counts of the indictment it would proceed under. This motion was denied by being ignored.

On the 21st of September, 1914, he made the same motion and it was denied.

On the day of his trial he again urged the motion to quash and again it was denied.

On the same day he made another motion to compel an election between counts without result.

The overruling of the motions to quash and motions to compel election are assigned as error in Subs. 1, 2, 8 of Assignment of Errors (Tr. of Rec. 35-37).

Had the defendant not raised his objections to the indictment at the proper time he might not now be heard to complain. But he objected to it in every possible manner and persisted in his objections until the judgment of the Court was rendered and entered. His clamorings were quite lost in the prosecutor's vociferous assertions that the pleadings were carefully drawn, all due weight being given to the rights of the defendant.

A glance at the record will, we think, preclude the United States from claiming that the fault found by the defendant goes to the form and not the substance of the pleading, or that he was not prejudiced by its shortcomings.

We deny that the defect is one of form only, but if we should admit it to be a defect of that kind we would stand uncontradicted in our position that the defendant was woefully prejudiced.

In the first place, had he been guilty, he could not have pleaded guilty to three offenses when he had committed but one. The Government has no right to expect that of any man. In the second place he now stands convicted twice of the same offense, and had it not been that the trial Court granted a new trial upon one of the counts of which the jury had convicted him he would stand convicted of three offenses.

Thus, the United States succeeded in doing indirectly what it could not do directly, namely, convict or put in jeopardy an accused twice for the same offense. We do not believe that it will be claimed that after a conviction or acquittal on a good indictment of any of the things charged in any of the counts that the defendant could be prosecuted again upon another indictment charging the matter set up in another of the counts.

It follows undoubtedly that this defendant has been put three times in jeopardy for the one offense and another portion of the Fifth Amendment ignored.

The courts have left no doubt as to the construction of the statute under which Wetzel, the Plaintiff in Error, was convicted. This Court speaking through Judge Ross in Lee's case (*infra*), when the identical point was before it in another form settles the question. Lee, the defendant in that case, questioned the indictment on the ground of its duplicity,

claiming that two of the things that make a letter non-mailable could not be pleaded in one count, but that they should be separated into two counts. The Court said:

“Upon the merits of the case but little need be said. The indictment does not charge two offenses. The charge relates to but a single letter alleged to have been deposited in the mails for transmission therein.

*Lee vs. United States*, 156 Fed. 948-950.

The case is exactly in point and the question was so elemental that it was disposed of in a few words without the citation of an authority.

Indeed, no authority is necessary beyond the easy and plain language of the statute itself and there are few authorities on the point. Burton's case (*infra*) decided in the Eighth Circuit nearly a year before Lee's case, Judge Van Devanter writing the opinion, is also exactly in point. The same statute is involved as is involved in the case at bar and the learned Judge deems the question so simple that he does not refer to authorities. Burton and a co-defendant were indicted in two counts which differed in the name and address to whom the circular was mailed. The Court will note that that indictment refers to two deposits in the mail, one to one person and the second to another person. An indictment which essayed to charge two separate letters mailed contrary to law, in one count would, of course, be duplicitous. We quote from the opinion:

“The defendants conceiving that *each* count charged two distinct offenses, because the printed circular was alleged to give information as to where, how, and of whom and by what means an obscene book might be obtained, and to contain in itself obscene matter, moved that the prosecutor be required to elect upon which of the two charges he would proceed. The motion was denied and this is assigned as error. The ruling was right. Whether the circular contained one or both of the matters alleged, it was non-mailable under Section 3893 of the Revised Statutes, the latter portion of which provides for the punishment of ‘any person who shall knowingly deposit or cause to be deposited, for mailing or delivery anything declared by this section to be non-mailable’. *The act charged* in each count was the mailing of a single copy of the circular, and that constituted but one offense.”

*Burton vs. U. S.*, 142 Fed. 57-59.

It is the claim of the learned District Attorney that Wetzel is charged with separate offenses by each count in the indictment, not by reason of the mailing of more than one letter since only one letter is claimed, but by reason of what was contained in that one letter. It was upon this theory that Wetzel was found *thrice* guilty, not of mailing three letters but of committing three offenses by mailing *one* letter.

This was precisely the claim of counsel for Lee and Burton, and if the learned District Attorney is right in his contention in the case at bar, then Lee and Burton were condemned without due

process of law. Counsel claimed in that case that each count charged two distinct offenses because the printed circular was alleged to give information as to *where, how* and of *whom* and *by what means* an obscene book might be obtained. The District Attorney in the case at bar claims that the different counts in the indictment against Wetzel charge separate and different offenses because the single letter was alleged to give information where things adapted for producing abortion could be obtained; where an abortion would be performed; and who would perform an abortion. And Wetzel was so convicted.

The contentions of the District Attorney in the case at bar and counsel for Lee and Burton are identical; to-wit: that the offense against the statute is the prohibited character of the information conveyed and not the manner of its conveyance. As for instance, it would be two crimes to send by one letter information where *two* obscene books might be secured, or it would be two crimes to send by one letter information where an abortion might be had at two different places or by two different persons or where two abortions might be had at one place and so on into as many different parts as the ingenuity of a prosecuting attorney might be able to dissect a single circular or letter written to a single individual.

But counsel for Lee and Burton were wrong. The indictment charged two distinct offenses, not

because the printed circular gave information as to where, how and of whom and by what means an obscene book might be obtained, but because the indictment charged in *two* counts the *mailing* of *two* separate and different circulars, each giving the prohibited information. If the District Attorney in the case at bar is right in his contention then Lee and Burton could have been and should have been charged, not with *two* offenses, but with *eight* crimes; to-wit: giving information two separate times as to *where*, *how* and *of whom* and by *what means* an obscene book might be obtained. The absurdity seems obvious, yet it is precisely upon such a theory and in such a manner that Wetzel was indicted and convicted. Wetzel was not indicted for and convicted of mailing more than one non-mailable letter as were Lee and Burton. His alleged offense consisted of having given information in one letter to one person as to by what means, where, and by whom an abortion might be secured. That was one offense just as it was two offenses for Lee and Burton to give information by *two* letters as to how, where, by whom and by what means an obscene book might be secured.

The reading of many reported cases does not disclose to counsel any further authority than the cases cited above.

The books are full of cases in which indictments with a multiplicity of counts are analyzed, but most of these cases deal with indictments where

each count was for a distinct offense. Likewise, there are many cases dealing with duplicitous indictments. But for cases like the one at bar exhaustive search of the decisions of the Supreme Court and other Federal Courts yields us nothing.

The error of the pleader who drew the indictment against Wetzel can be accounted for only upon the theory that he misconstrued Section 1024 R. S. and relied upon the Court's stretching Section 1025 R. S. from its accepted meaning far enough to cover the carelessness.

Rumble's case (*infra*) may be of some aid to this case. It was decided by this Court, the opinion being written by Judge Hawley, and while it may have no great bearing on the merits of this case, it demonstrates that a prosecutor, by having sound consideration for the legal rights of a defendant and thus proceeding carefully and lawfully, achieves lawful results. It is the antipode of this case, where by careless and unlawful proceedings, careless and lawless results are brought about. Mr. Devlin was the United States Attorney who presented Rumble's case to the courts. By a timely election between counts and a *nolle prosequi* as to superfluous ones he relieved the Court of the necessity of seriously considering the reversal of a judgment.

*Rumble vs. United States*, 143 Fed. 772-776.

The general rule of law applicable to misjoinder of counts in an indictment is well stated in Nye's case (*infra*) and is quoted by Judge Hawley in Rumble's case (*supra*). While neither Rumble's nor Nye's case are directly in point here, for the reason that they deal with the question of a multiplicity of offenses charged in separate counts, while this case deals with *one* offense charged a multiplicity of times in separate counts the rule may well be the same.

"In all cases where there has been an improper number of offenses joined in an indictment the court may, in its discretion quash the indictment; but it is always addressed to the *sound* discretion of the court in cases of that character. It may in its discretion, quash the indictment, or it may permit the prosecutor to *nolle* certain counts, or it may compel the prosecutor to elect which one he will proceed upon, so that the defendant shall in no sense be prejudiced in his defense."

*U. S. vs. Nye* (C. C.) 4. Fed. 888-893.

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### **Argument on Points Raised by Demurrer.**

We do not hesitate to say that the indictment, as far as its actual substance is concerned, is the most dangerous thing of its kind that we have ever seen. Departing from the well-settled rules of criminal pleading this document perversely hides from the accused the one thing that it was necessary for him to know in order to prepare his

defense, and spreads before him in large capitals the names of two famous Americans, the one an ex-President of the United States and at the time of the return of the indictment a candidate for election to that office, and the other, the Governor of his state and a candidate for Vice-President of the United States, matter wholly unnecessary to the pleading and not only useless to the defendant, but highly prejudicial to his rights and calculated to deceive him.

Whether a grisly humor prompted the omission from the indictment of that which was necessary to it and caused the insertion of a political poster of no value to either the document or the one accused, is problematical. Perhaps it was so inserted to throw into the scales against the defendant any political prejudices that might exist in the minds of individual jurors.

Whatever may have been in the mind of the pleader when he drafted this secretive accusation with its cryptic figures and political dodgers, the United States is now unwilling to submit it to this Court without the key to and explanation of it that was refused the person whose liberty they were seeking to take by means of it. (Bill of Exceptions, Tr. of Rec. pp. 26-27.)

By the very amendment to the Bill of Exceptions proposed by the Government it admits the secretiveness of the indictment, for otherwise why should it put into a Bill of Exceptions a newspaper advertise-

ment and a letter, which in the trial was offered against the defendant, the introduction and reception of which in evidence only the defendant could have complained of, objected or excepted to.

Unquestionably this is an attempt to explain the indictment in this Court after a continuous refusal to explain it to the person most interested in it, he whom they sought to condemn.

If this indictment needs no explanation why attempt to explain it here? Why give this Court the special information unless the learned counsel for the nation fear that this Court might be puzzled by its text?

Whether a guilty man would be warned by its deceptive allegations is not the question. Guilt needs no warning. It was the innocent that the Fifth Amendment sought to protect from prosecution and condemnation.

The defendant objected to it and never ceased until the hour of his condemnation in the District Court. By his demurrer he placed his objections before the Court. He claimed that the whole indictment and each of its counts did not state facts sufficient to constitute an offense against the law; that it was without any meaning whatever upon its face; that the words 938 and 100 pasted upon the political dodger were ambiguous; that it could not be ascertained whether they constituted a cryptogram or cipher or whether they were to be taken in their accepted meaning in English or not; that

for the same reasons it was facetious and frivolous, uncertain and unintelligible. (Demurrer, Tr. of Rec. 9 to 16.) After the verdict he again objected by his motion for a new trial and his motion in arrest of judgment. (Tr. of Rec. 28, 29, 30.)

The error in the overruling of the demurrer, in the denial of the motions for a new trial and to arrest the judgment are covered by Assignment of Errors 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13. (Tr. of Rec. 35 to 39.)

This condemned man does not come into this high court finding spots on a fair, although somewhat informal indictment. He comes clothed with the armor of the presumption of innocence which was stripped from him in the District Court. The document he had to face was pregnant with useless and unnecessary information, while it withheld the only matter of any consequence to the accused. It was no more than, as was once said by a learned justice of the Supreme Court, "a rule to come into court and show cause, if any he had, why he should not be hanged."

It was a trap. A bait of cryptic figures and tempting capital letters was skillfully placed before the eyes of the quarry while deep in the conscience of the pleader was the hidden trigger.

We claim that the Fifth Amendment and all the decisions of the courts from the beginning stands between an accused man and a trial under such an

indictment. It seems inconceivable that the United States should set a snare which could only be avoided by a *guilty man*.

Grimm's three cases (*infra*) put the true rule for indictments for offenses of this character squarely before a pleader. Indeed, these three cases better illustrate the difference between a good and a bad indictment than it is usually the fortune of an investigator to find and all relate to the offense against the law under consideration in the case at bar. In a case like the case at bar where Sec. 211 of the Criminal Code (Sec. 3893 R. S.) is under consideration these three cases are particularly illuminating.

In the first the opinion quotes so much of the indictment as was necessary for the Court to illustrate its point. It is remarkably like the indictment in the case at bar, though Grimm's indictment, is, as a pleading, so much superior to Wetzel's that it would only be permissible to mention them together for the reason that a demurrer to Grimm's indictment on the ground of its uncertainty was sustained. Yet the information it gave the accused was volumes compared to what was given Wetzel.

In that case the Court says:

"The difficulty in the present case is that the pleader did not content himself with declaring the general language of the statute, even if that would have sufficed. He has set out the letters in full, and thereby thrown discredit on

the allegation that they give information where obscene pictures can be obtained. If it was deemed essential to set out the letters in full, then, as they do not on their face purport to give information such as the statute prohibits, the pleader should have set out the other extrinsic facts upon which the government relies to show that they contained information denounced by the statute."

*United States vs. Grimm*, 45 Fed. 558.

When the demurrer in that case was sustained, it is evident that another indictment was obtained containing the vital matter left out of the first. Examining the indictment in the first case, it will be seen that the Government held back a particular letter. In the second case (*infra*) the suppressed letter was set forth, the Government giving the defendant *all* that it had. No suppression and no deceit were claimed. A demurrer was overruled.

*United States vs. Grimm*, 50 Fed. 528.

In that case, the indictment is not set out in full, and it may be argued that Judge Thayer, who also decided the first case, turned about to some degree. That is not so. As in the first case he applied the law to a bad indictment, so in the second case he applied the law to a good indictment. He could have done no more or no less in either case.

But the second case went to the Supreme Court and is reported with enough of the indictment for discussion.

*Grimm vs. U. S.*, 156 U. S. 604.

As that indictment was drafted and as Grimm was warned what he would have to meet at his trial, so should the indictment in the case at bar have been drafted that Wetzel, the defendant, could have organized his defense. The letter rushed into the bill of exceptions (a doubtful place for it) should have appeared on the face of the indictment where it belonged.

In the Grimm case last cited it must be remembered that Grimm was given all the information that the Government could give, while in this case the most important matter was willfully kept from the defendant, while matter calculated to deceive was furnished lavishly.

It will be worse than useless for the Government to urge here that a letter or circular apparently and obviously obscene need not be pleaded. We admit such to be, as it should be, the law. The document rushed into the Bill of Exceptions at the last moment is not obscene and it could be pleaded by the most modest pleader, and would have been in much better taste than the spreading out in capital type of the names so arrogantly flaunted upon its face.

Suppose, however, it was of the character that required its being pleaded by reference only. Examine the indictment against Wetzel and it will seem that there is not the slightest reference to the letter which would warn or inform the defendant of its existence.

We do not cite the scores of cases which show the way that indictments in cases like the case at bar should be drawn. We have read most of them and think that not one authority exists that justifies the looseness and deceptiveness in the one now under consideration. We do not find a single case in which the United States seeks to justify an indictment so substantially defective.

Among the latest cases on the subject are the following:

*Clark vs. U. S.*, 202 Fed. 740;

*Bartel vs. U. S.*, 227 U. S. 427.

To sum up on this point we assert that not only is this indictment ambiguous and unintelligible but it fails to state facts sufficient to constitute an offense against the statute, and that this is plain upon its face; that all the explanation of it in the amendment to the Bill of Exceptions by which it is now sought to influence this Court, should have been given to the defendant, this Plaintiff in Error, if not by setting out the text of the secret letter, by a certain and unmistakable reference to it in the indictment.

Under such indictments men should not be put upon their defense. With the wide latitude given by the statute (Sec. 1025 R. S.) and with the wise and well-considered rule for the construction of the Fifth Amendment set down by the courts, no further

licence should be allowed criminal pleaders, lest innocent men suffer and guilty men escape.

For the reasons urged in this brief we believe that we have convinced this Honorable Court that the motion to quash should have been granted, but that not having been done, the United States should have been compelled to elect between the counts as to upon which it would proceed against the defendant. We also believe that the demurrer should have been sustained, upon each and all of the grounds in it set out and that it having been overruled, the motion in arrest of judgment should have been granted.

Therefore, we respectfully submit that the verdict of guilty should be set aside.

Respectfully submitted,

CATLIN, CATLIN & FRIEDMAN,

*Attorneys for Plaintiff  
in Error.*

AUGUSTIN C. KEANE,

*Of Counsel.*

# United States Circuit Court of Appeals

J. F. WETZEL,

*Plaintiff in Error,*

VS.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

## BRIEF OF DEFENDANT IN ERROR

JOHN W. PRESTON,

United States Attorney,

M. A. THOMAS,

Assistant U. S. Attorney,

Attorneys for Defendant in Error.

Filed this.....day of April, 1916.

FRANK D. MONCKTON, *Chrl.*

By....., Deputy Clerk



No. 2696

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

J. F. WETZEL,

VS.

*Plaintiff in Error,*

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

## BRIEF OF DEFENDANT IN ERROR

There are only two points raised by the plaintiff in error, both going to the indictment. The first point is that the indictment charges the same offense in each of the three counts. The defendants below attempted to meet this alleged defect first, by a motion to quash, and then by a motion to require the prosecution to elect as to which of the three counts the trial would proceed upon. There is no question but that the motion to quash as to the whole indictment was properly overruled. Clearly an indictment which is good as to any one of three counts, should not be wiped out in its entirety if it should appear that the second and third counts do not add anything to the indictment, but are repetitions of the offense charged in the first count. If

the defendant's theory is correct, the motion to quash should have been directed to two of the counts of the indictment only. No such motion was ever made or ruled upon.

The motion to require the Government to elect, is a proper method of procedure if it should appear that the indictment is bad in the particulars first named, and that the defendant will be prejudiced in his substantial rights in being compelled to go to trial on the three counts.

The statute, Section 211 Federal Criminal Code, provides that:

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or from whom, any of the herein before mentioned matters, articles or things may be obtained or made, or where, or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed \* \* \* is hereby declared to be non-mailable \* \* \*."

The first count of the indictment charges that the letter and notice gave information where divers articles and information designed and intended for producing an abortion might be obtained.

The second count charges that it gave information where an operation for the procuring and producing of an abortion could be performed.

The third count charges that it gave information as to who would perform the operation.

There is no question that each count states a public offense as I shall subsequently show in defense of the indictment on the second point of attack.

Counsel for the Government is familiar with the cases of *Lee vs. U. S.*, 156 Fed. 948, and *Burton vs. U. S.*, 142 Fed. 57, and is forced to admit that the ruling of the courts in those cases that an indictment in one count for mailing a letter containing the several kinds of information, is not duplicitous, argues strongly that the one mailing constitutes one offense only. That the statute may be given the construction placed upon it by the pleader in this case, is suggested by Mr. Justice Shiras in the case of *Swearingen vs. U. S.*, 161 U. S. 446 *et seq.*; 44 L. Ed. 765.

In that case the Court said in discussing an indictment under this same section:

“The language of the statute is that ‘every obscene, lewd, or lascivious book or paper’ is non-mailable, from which it might be inferred that each of those epithets pointed out a distinct offense. But the indictment alleges that the newspaper article in question was obscene, lewd and lascivious. If each adjective in the statute described a distinct offense, then these counts would be bad for duplicity and the defendant’s motion in arrest of judgment ought to have been sustained. We, however, prefer to regard the words ‘obscene, lewd or lascivious’ used in the statute, as describing one and the same offense. That was evidently the view of the pleader and of the Court below, and we think this is an admissible construction.”

The pleader in the case now before this Court evidently took a different view and I leave it to the Court to determine whether or not this is an admissible or proper construction of the statute. I desire to suggest also that it is easier to differentiate between the three kinds of matter referred to in the indictment now under consideration, than it is between the three terms "obscene," "lewd" and "lascivious."

The Circuit Court of Appeals for the Seventh Circuit in the case of *DeGignac et al. vs. U. S.*, 113 Fed. 197, p. 201, said:

"The gist of the offense is the giving of the information by mail."

If that is true, we submit that three different kinds of information were given by mail by means of the letter set up in the indictment, and that the giving of each kind of information is particularly denounced by the statute.

The second point raised by plaintiff in error that the indictment is bad because the letter pleaded is innocent on its face and the pleader does not set out the other extrinsic facts upon which the Government relies to show that it contained information forbidden by the statute, is clearly not good. Counsel relies on the case of *U. S. vs. Grimm*, 45 Fed. 558; *U. S. vs. Grimm*, 50 Fed. 528, and *Grimm vs. U. S.*, 156 U. S. 604, and cites the first case for an example of bad pleading and the other two for an example of good pleading in a case of this kind.

The first reference is proper enough, but a careful reading of the case reported in 50 Fed. 528 and 156 U. S. 604, does not disclose that either the District Court or the Supreme Court considered that all of the matter set forth in the indictment there under discussion were necessary, or that a setting out of the whole correspondence was necessary in order to make the indictment good. In other words, while the Supreme Court has held that the indictment in the second Grimm case is good, it has not held that an indictment which adopts another means of setting forth the information required by law to make a good indictment is not equally good, if it furnishes the required information.

The indictment under examination here after setting up the letter or notice, has in the first count a direct allegation "that said figures so pasted on the back of said circular as aforesaid, then and there gave information that divers articles and things designed adapted and intended for producing abortion, might be obtained at No. 938 Fillmore Street, in the City and County of San Francisco, California. \* \* \* " (Tr. pp. 4, 5). There is a corresponding allegation in each of the other two counts.

The indictment in the first Grimm case merely sets up the letter or notice, innocent upon its face, and contains no allegation whatever to show that it actually gives information as to where the obscene

matter may be secured, and so on that account was held to be insufficient (*U. S. vs. Grimm*, 45 Fed. pp. 558, 559).

This was observed by the Circuit Court of Appeals in the case of *DeGignac et al. vs. U. S.*, 113 Fed. 197, where the Court said at the bottom of page 201, in referring to the first Grimm case:

“In the first Grimm case the main objection to the indictment and the one on which it was held insufficient for uncertainty was that it did not contain any averment either in the writing itself or by way of explanation as to the place where the objectionable matter could be obtained. The indictment failed to aver that the writing complained of conveyed the information denounced by the statute.”

The indictments in the first and second Grimm cases are fully discussed in the *DeGignac* case above referred to, and the Court says at pages 200 and 201 of Vol. 113 Fed., with regard to the indictment in the second case:

“Counsel contend that an indictment drawn under this section for mailing prohibited matter, or for mailing a writing giving information where such matter may be obtained, is subject to the rule of pleading applicable to indictments for slander, libel, forgery, etc.; that the case at bar is strictly analogous to an indictment for criminal libel; that therefore, in order to make a good indictment, the writing itself must upon its face purport to be what is prohibited, or, failing in that, the indictment must contain explanatory allegations, averments, or writings

showing that the writing itself, interpreted by such explanations, does not contain what is prohibited.

“This contention cannot be sustained. The primary object of this federal enactment (Sec-3893 Rev. St. U. S.) is to protect the mails from corrupt communications. The incidental purpose of the law is to protect the public morals. The law has been construed by the Supreme Court. It is not necessary, in an indictment under this section, that all the words constituting the information should be pleaded, with the particularity used in cases for libel and forgery. It is sufficient that the character of the information be described, leaving further disclosures to the introduction of evidence. The offense here denounced is the giving of information by mail where obscene matter may be obtained. Any communication by mail which does this is actionable. The gist of the offense is the giving of the information by mail. It is not necessary to aver ownership or possession of the obscene matter. Neither is it necessary to aver that the information was given to one who inquired for or desired the same. One very common purpose of those who violate this statute is the corruption of the young and the innocent. It is not necessary that the writing complained of should in terms describe the obscene matter. The writing may be innocent and harmless on its face. Yet, if it in fact gives information where obscene matter may be obtained, and the explanatory averment so states, it cannot save the plaintiffs in error harmless because the obscene matter in question is described by the indefinite term of ‘views’.”

We submit that each count of the indictment standing alone, properly states an offense. The record shows (Tr. p. 31) that the Court granted

defendant's motion for a new trial as to the first count of the indictment, and denied it as to the second and third counts, upon which counts sentence was pronounced. The sentence was imprisonment for the term of six months in the Alameda County Jail, which sentence is easily supported by each of the counts in view of the fact that the penalty prescribed by the statute, and which might have been imposed upon each count, is a fine of not more than \$5000 or imprisonment for not more than five years, or both.

Bearing in mind Section 1025 Revised Statutes, we submit that the defendant was not, in the course of the trial, deprived of any substantial right.

Respectfully submitted,

JOHN W. PRESTON,  
United States Attorney,

M. A. THOMAS,  
Assistant U. S. Attorney,  
*Attorneys for Defendant in Error.*

No. 2696

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

J. F. WETZEL,

*Plaintiff in Error,*

VS.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

## PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR

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CATLIN, CATLIN & FRIEDMAN,

*Attorneys for Plaintiff in Error.*

AUGUSTIN C. KEANE,

*Of Counsel.*

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*Filed this*.....*day of August, 1916.*

FRANK D. MONCKTON, *Clerk.*

*By*....., *Deputy Clerk.*



No. 2696

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

J. F. WETZEL,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

## PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR

To the Hon. William B. Gilbert, Presiding Judge,  
and the associate Judges of the United States Circuit Court of Appeals, for the ninth circuit:

Plaintiff in Error respectfully petitions that the decision of this Court herein be set aside and that a rehearing of the cause be granted.

The grounds of the application are:

First: That the form and contents of the indictment in this case together with Plaintiff in Error's right to a fair, certain, intelligible indictment, charging him but once with one offense, as guaranteed under the Fifth Amendment to the Constitution of the United States, has not received adequate consideration at the hands of the Court.

Second: That the Court has failed to give adequate consideration to the Plaintiff in Error's constitutional right to be put in jeopardy and tried no more than once for one offense.

This is an action in which the United States have sought, by an indictment, to charge the Plaintiff in Error with committing three offenses, in violation of Section 211 of the Federal Criminal Code.

On the hearing before this Court the main question raised and the one relied upon here, was that the indictment charged the Plaintiff in Error three times with the same identical offense and *a fortiori* placed the plaintiff in error thrice in jeopardy for the same offense. In the court below the Plaintiff in Error availed himself of every means within his command to correct this error and to protect his constitutional right. He waived nothing.

Plaintiff in Error feels assured that the Court has erred in rendering its decision affirming the rulings and judgment of the District Court and feels confident that the indictment is a violation of his constitutional right to be put in jeopardy and tried but once for one offense; that said indictment charges him with the commission of but one offense three separate and distinct times; that the depositing in the mail of a letter containing any or all of the matters enumerated in Section 211 of the Federal Criminal Code comprises but one offense against the laws of the United States.

The purpose of Section 211 was to constitute the depositing in the mails of certain prohibited matter an offense. The contents of any letter deposited in violation of this section is but a secondary element of the crime. To write a letter containing any one of the matters prohibited by Section 211 is a violation of no law that we know of. One may write all such matters as they please with impunity and are not subject to either prosecution or punishment for the same, but when a person deposits a letter containing such matter in the Post Office Establishment of the United States, then he violates the law and not until then. The *depositing of the letter* and *not* its contents constitutes the offense. The contents are resorted to only for the purpose of determining the legality of the deposit. One letter can be deposited in the mail but once at any one moment of time and if it contains either one or all of the prohibited matters contained in Section 211 only one offense has been committed, to wit: the depositing of such a letter in the United States Post Office.

The Supreme Court of the United States has unequivocally stated this to be the law. We quote from *in re Henry*, 123 U. S. 372-374, which was an action maintained for a violation of Section 5480 of the Revised Statutes:

“The act forbids, not the general use of the Post Office for the purposes of carrying out a fraudulent scheme or device, but the putting in the Post Office of a letter or packet, or the

taking out of a letter or packet from the Post Office in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the act. It is not, as in the case of *in re Snow*, 120 U. S. 274, a continuous offense, but it consists of a single isolated act, and is repeated as often as the act is repeated."

We also refer this Court to the following cases in which the language quoted above is cited with marked approval.

*In re De Bara*, 179 U. S. 316-321;

*Francis vs. United States*, 152 Fed. 155-156  
(C. C. A.).

This Court has erroneously, we firmly believe, held that Plaintiff in Error suffered no prejudice by the ruling of the trial Court in that the judgment imposed virtually had the effect of merely sentencing the defendant below for the commission of but one offense. We gravely doubt if aided by judgment can go to such lengths. If the trial Court was correct in imposing a judgment and sentence for the commission of but one offense (we quote from this Court's opinion)

"\* \* \* the single act of sending by mail the figures '938' and '100' in answer to a letter of inquiry as to a proposed abortion."

then it erred in not sustaining Plaintiff in Error's motion to quash the indictment and in refusing to compel the Government to elect, and this Court

erred in affirming the action of the trial Court. If, as we contend and as this Court and the trial Court apparently believe, the defendant below committed the "single act" of sending by mail prohibited matter, then he can not be forced to trial upon an indictment charging him with this one offense three separate and distinct times. In this case he would be (and was) tried, not for depositing a letter in the mails containing prohibited matter, but for the various prohibited matters contained in the letter so deposited.

The Fifth Amendment firmly binds the United States and an accused is at all times entitled to the benefits of its provisions; more especially if he insists upon it, as the defendant below did in this case, by a motion to quash the indictment and by motions to compel the Government to elect. Any violation of its provisions is prejudicial to an accused and constitutes such error as will afford him relief from any verdict, judgment or sentence imposed contrary to its terms, and this irrespective of the degree in which the accused was prejudiced. This Court can look only to the fact of whether the accused was granted all the rights guaranteed to him by the Constitution and cannot look to what less or greater extent he was prejudiced by a deviation or violation of its express terms.

The mere deprivation of any one of the rights so guaranteed is a sufficient prejudice *of itself* to afford him relief from any verdict or judgment in which

such deprivation of right forms even the most minute ingredient upon which such verdict or judgment rests.

Before one accused of crime can be tried and, if found guilty, sentenced, he must be charged with the commission of the crime by a good and fair indictment in conformity with the express mandate of the Constitution. The indictment is the keystone which supports each and every other proceeding in the trial of the case, and if this this keystone is defective it must fall and all that it supports must necessarily fall with it.

Counsel for Plaintiff in Error feel assured that if they are accorded the opportunity of once again presenting their contention for the consideration of the Court that they can convince it of the merit of the propositions herein enumerated.

Owing to the fatal illness and decease of one of the senior counsel, Mr. Harry C. Catlin, for Plaintiff in Error the surviving counsel have been unable at this time to make this petition for a rehearing as full and replete with authority as they, under more favorable conditions, would have been able to do and therefore your Plaintiff in Error prays that he be accorded fifteen days additional time from the filing hereof within which to amplify this petition by a supplemental brief containing additional authorities upon the propositions herein briefly enunciated.

Dated, San Francisco, August 2, 1916.

Respectfully submitted,

CATLIN, CATLIN & FRIEDMAN,  
*Attorneys for Plaintiff in  
Error.*

AUGUSTIN C. KEANE,  
*Of Counsel.*

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### CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for Plaintiff in Error and petitioner in the above-entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

LEO R. FRIEDMAN,  
*Of Counsel for Plaintiff in Error.*

